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No. 411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

ALICE D. WRATHER, Et Al.,
Petitioners,

v.

THE AMERICAN UNIVERSITY, Et Al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

ALICE D. WRATHER, PERCY H. RUSSELL, JR., CLAYTON H. HIXON, FRED A. SMITH, HARRISON SOMMERVILLE, H. LAMAR HENDERSON, JOHN L. SULLIVAN, HAROLD R. STARK, THOMAS W. McGREGOR, *Petitioners,*

v.

THE AMERICAN UNIVERSITY, A CORPORATION; LUCY WEBB HAYES NATIONAL TRAINING SCHOOL FOR DEACONESSES AND MISSIONARIES, A CORPORATION; AND EQUITABLE LIFE INSURANCE COMPANY, A CORPORATION, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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To the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia setting aside an order of the Zoning Commission for the District of Columbia rezoning part of the American University Campus zoned Residential "A" to Residential "A Restricted." Residential "A" permits apartment houses and other similar uses including hospitals; whereas, Residential "A Restricted" is restricted essentially to single family homes. However, the zoning rights

of the University for college or university use are identical under Residential "A" or Residential "A Restricted" zoning.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix "A" to this petition. The opinion of the District Court, referred to in the opinion of the Court below is reported under the caption of the *American University, et al.* v. *Prentiss, et al.*, in 113 F. Supp. 389.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1954. The order denying the petition for rehearing was entered July 21, 1954. This writ for a petition of certiorari is filed within the time prescribed in 28 U.S.C.A., Sec. 2101 (c). The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254.

QUESTIONS PRESENTED

I.

This Court is requested to pass for the first time upon the constitutional limitations applicable to REZONING as distinguished from ORIGINAL ZONING. Although there are many State and Federal decisions on this point, they are in sharp conflict. In several rezoning cases, petions for writs of certiorari were filed with this Court and each case certiorari was denied. It is important to note that not one of these petitions directly requested this Court to determine the constitutional limitations applicable to rezoning. The answer to this question is of national importance because the widespread conflict among the lower courts threatens to impede effective zoning. It is, therefore, submitted that the question should be settled by this Court.

In the present case, the Zoning Commission for the District of Columbia rezoned a portion of the American University's campus formerly zoned Residential "A", which permits apartment houses and other similar uses, including hospitals, to Residential "A Restricted", which is restricted essentially to single family detached homes. The rezoning of the University Campus placed that property in the same zoning classification as its neighbors on all sides except on one street frontage opposite the University across Nebraska Avenue. The action of the Zoning Commission did not in the slightest degree affect the rights of the University to continue to use its property for all appropriate University purposes as its rights for such purposes are the same under Residential "A" or Residential "A Restricted" zoning. The Zoning Commission found that the rezoning of part of the University campus would promote the public health, welfare, and safety of the inhabitants of the part of the city affected and of the city as a whole. This action was taken only after the commission found: (a) There had been a change of conditions in the neighborhood since the original zoning in 1920 whereby undeveloped woodlands had been transformed into a neighborhood of single family homes; (b) the retention of apartment house zoning upon a part of the University campus constituted an obvious zoning mistake because it permitted apartment zoning to project into a single family area without any zoning justification; and (c) the Zoning Commission adopted a new policy to eliminate apartment house zoning wherever possible as the result of a study by the National Capital Planning Commission, which revealed that there was a substantial excess of apartment zoning within the city.

The Courts below held that the order of the Zoning Commission rezoning part of the University campus (about 70 acres of land) deprived the University of the use of its property in violation of the Fifth Amendment of the Constitution.

The question presented therefore is whether constitutional limitations prohibit rezoning of land in cases when the zoning authorities find: (a) that there has been a change of conditions since the date of original zoning, or (b) that there has been a mistake in the original zoning, or (c) that a change in zoning policy is necessary; and that for one or more of these reasons it is essential to rezone land in order to promote the public health, safety or welfare of the inhabitants residing in the area directly affected, or throughout the City as a whole.

II.

The courts below held that the Zoning Commission was prohibited under the Fifth Amendment from rezoning the portion of the American University zoned for apartment house use to a zoning classification restricted essentially to single family use. This Court long ago settled the law that under ORIGINAL zoning apartment houses may be excluded from an area zoned primarily for single family use. The petitioners contend that if the exclusion of apartment houses from a single family area bears a substantial relationship to the promotion of public health, welfare, safety, and morals under ORIGINAL ZONING the same relationship would exist under REZONING. A Circuit Court of Appeals has held that the same relationships to the promotion of public health, safety, and welfare exist under original zoning or rezoning.

The question here presented, therefore, is whether the decision below setting aside the order of the Zoning Commission's rezoning part of the University campus, which order excluded the location of apartment houses and hospitals in an area restricted essentially to single family homes, is in conflict with a decision of a Circuit Court of Appeals.

III.

The decision of the District Court, affirmed by the Court of Appeals, completely transgressed the scope of judicial review of an action of an administrative agency as laid down by this Court in these two important respects: (1) The District Court in reviewing the order of the Zoning Commission held that "The suit does not even contemplate a Judicial review of administrative action to determine whether there was a deviation from any statutory requirement or limitation and whether the findings of fact are supported by substantial evidence." (JA 41). The decision of the Court was made although the Zoning Commission held a public hearing at which 524 pages of testimony were taken pursuant to statutory requirements and limitations and, thereafter, the Commission made its finding based upon substantial evidence in the record. (2) The District Court and the Court of Appeals made no ruling with respect to the exhaustion of an administrative remedy, although this issue was presented timely and was vital to the ultimate determination of the case. The Courts below held that the order of the Zoning Commission violated the Fifth Amendment because it excluded a hospital which was to be operated by an independent corporation upon a parcel of land carved from the American University campus. This petitioner advised the Court that the question whether a hospital or school of nursing is a part of the American University is a question within the exclusive jurisdiction of another administrative agency, created by an act of Congress, namely, the Board of Zoning Adjustment and not the Zoning Commission. The University has at no time made an application to the Board of Zoning Adjustment for permission to establish a hospital upon the University Campus as a part of the University. This is a prerequisite irrespective of whether the campus was zoned for single family use or apartment house use.

The questions presented, therefore, are (1) does a judicial review of an action of an administrative agency require a court to determine whether the Zoning Commission acted within its statutory authority and made its finding based upon substantial evidence in the records and (2) may a party proceed to attack the rezoning of its property in a judicial proceeding when it fails to first exhaust its administrative remedies.

STATUTES AND REGULATIONS INVOLVED

District of Columbia Code 1951 edition, Title 5, Section 413-415, 417 and 420. Zoning Regulations of the District of Columbia, 1953 edition, Use and Occupancy Table, Section III, pages 8-11 and Section XXIII, Part 2, Paragraph 1, pages 39 and 40.

These are extensive provisions. They are printed as Appendix B at the end of this petition, pages 25-39.

STATEMENT OF THE CASE

The Facts

In January, 1953, the Zoning Commission of the District of Columbia held a public hearing in accordance with Title 5, Section 415, District of Columbia Code (1951 Ed.) to consider a request of the residents of the Spring Valley-Wesley Heights area to rezone a portion of the American University zoned Residential "A" to Residential "A Restricted". All boundaries of the University property are adjacent to land zoned Residential "A Restricted" except for a street frontage opposite the University along Nebraska Avenue, N.W. This request involved the rezoning of most of the American University campus, although strips of the campus property along Massachusetts Avenue and Rockwood Parkway were already zoned Residential "A Restricted". Residential "A Restricted" zoning is restricted essentially to detached single family residences

and churches; whereas, Residential "A" permits apartment houses and other similar uses including hospitals.[1] Colleges and universities may be located, and be maintained and expanded, in either Residential "A" or Residential "A Restricted" zones,[2] without any different limitations applying as between these two zoning classifications. (See also page 34 appendix B to this petition.)

The Zoning Commission is required by an Act of Congress to refer all applications for amendments to the zoning map or regulations to the Zoning Advisory Council for a report.[3] The Zoning Advisory Council membership consists of three experts on planning. The Commission also receives a report from the Citizens Advisory Council. Each of these advisory councils, without a dissenting vote, recommended approval of the requested rezoning of the American University campus (JA 51-53).

The Zoning Advisory Council report found that the rezoning should be granted for the following reasons: (1) The rezoning of part of the University campus would be consistent with past zoning history and the change in neighborhood conditions from woodland in 1920 to a detached home area of today. (2) The intrusion of a large hospital into this area would create objectionable traffic conditions. (3) The operation of the hospital would impair property values. (4) The hospital would impair the use and enjoyment of many of the nearby homes. (5) The rezoning from apartment house use to a restricted residential use is in accordance with the zone plan and reflects the latest zoning policy of the Commission. (6) The American University's use of its property for university purposes will be unaffected by the rezoning. (7) The retention of apartment house zoning upon part of the University campus,

[1] Zoning Regulations of the District of Columbia (1953 Edition), Section III, pp. 8-11 (Appendix B pages 35-38).

[2] Zoning Regulations of the District of Columbia (1953 Edition), Section XXIII, part 2, paragraph 1, p. 39 (Appendix B pages 38-39).

[3] Title 5, Sec. 417, D. C. Code, 1951 Edition (Appendix B page 29).

almost completely surrounded by restricted residential area, without zoning justification, constitutes an obvious mistake in the Original zoning.

The residents of Spring Valley and Wesley Heights presented their case before the Commission on January 5 and 6, 1953. The University and Sibley Hospital presented their case on January 16, 1953. This hearing was the longest ever held by the Commission, involving a single piece of property, at which 524 pages of testimony was taken. A full hearing was given, at which time all parties were permitted to submit such evidence as they deemed appropriate, to cross examine witnesses, and at the conclusion of the taking of testimony no objections were made by either side.

After the hearing was concluded, the Zoning Commission took the case under advisement. On January 28, 1953, the Zoning Commission entered an order in which it adopted the report of the Zoning Advisory Council as its findings (JA 559). This is a practice long followed and is the same procedure followed by the Zoning Commission in the case of *Lewis* v. *District of Columbia,* 89 App. D.C. 72; 190 F. 2d 25, which the Court of Appeals of the District of Columbia approved.

The record of the proceedings before the Zoning Commission in January, 1953, disclosed substantial evidence to support each finding of the Commission as follows:

(1) That the rezoning of the University campus would be consistent with past zoning history and development in the area was fully supported by the report of the Zoning Advisory Council (JA 51-53), and by the testimony of Earl S. Draper, planning expert (JA 58-59). This evidence revealed that the area was undeveloped woodland in 1920. Thereafter, as the neighborhood was developed by single family homes, the Zoning Commission extended the Residential "A Restricted" zoning to protect the developed area because of the change in conditions in the neighborhood. This change in conditions has continued until today the University is surrounded on all but one frontage

by Residential "A Restricted" zoning. The respondents made no objection to this evidence; nor did they offer any testimony to rebut it. (2) Charles M. Upham, traffic expert, testified that location of a hospital in the area would cause a dangerous traffic condition and an acute parking problem. In support of these conclusions, he called attention to (a) the existing heavy traffic on Massachusetts and Nebraska Avenue, which at certain period of the day exceeds the highway capacity and causes traffic problems, (b) the present street system in this neighborhood includes narrow, winding, and dead-end roadways, some with steep grades and designed solely for neighborhood traffic, and (c) the necessity for providing widened thoroughfares should the hospital be established as proposed (JA 65-69.) (3) Earl S. Draper, planning expert, testified that one could not visualize a neighborhood which lends itself to a lesser extent than this area to a hospital use particularly because of the characteristics of the streets serving the area (JA 55); that the traffic from the hospital would raise havoc with streets in the residential area because of location, width, topography, and design (JA 59); and that, 49th Street through the heart of the Spring Valley area would become a heavy traffic thoroughfare (JA 63). This would obviously destroy the present character of the neighborhood. (4) Residents of the area also testified as to the streets in the area being narrow, and winding and designed only for local traffic (JA 98-101); that many children reside in the area (JA 98-105); and that no playground is provided for the area because of the street plan and large lots appeared adequate to provide play area for the children (JA 113).

Respondents' only testimony on this latter point was that of Mr. Justement, an architect, who testified that when Fort Drive is completed, Nebraska Avenue will carry a heavy traffic load. This involves the construction of a bridge over the Potomac River, a project of uncertain realization.

The testimony upon which the District Court made its findings on this point was testimony which was not before the Zoning Commission.

(5) The findings that the property values would be impaired if the University campus retain apartment house zoning including the right to build a hospital, was fully supported by the evidence before the Commission. J. Rupert Mohler, real estate expert, testified that homes located near the proposed hospital site, based upon separate appraisals made of each of the residences affected, would suffer a depreciation in the present fair market value of the properties of not less than $2,500,000 (JA 80) as a result of permitting the erection of the proposed hospital. This testimony, although subject to cross examination, remained unimpeached and unrefuted. There was also the testimony of Mr. Corcoran Thom, the chairman of the board of directors of the American Security and Trust Company of this City, and one of the nearby residents, that the proposed hospital would change the character of the area and would necessarily affect property values (JA 119).

Respondents' only testimony on this point was that of William H. Throckmorton, real estate expert, who testified that there might be a loss of value as the result of a hospital being erected (JA 250-252).

The District Court's findings on this point likewise were based on evidence not before the Commission.

(6) The erection of a hospital upon the American University campus would impair the use and enjoyment of many of the nearby homes. This was fully substantiated by the evidence. The District Court judge admitted this to be a fact (TR. 117 and 121). There is testimony of Earl Draper, a city planner, and also the residents of the neighborhood, to support the Zoning Commission's findings. The testimony showed that the hospital operation would be incompatible with the present development of the area (JA 55); that objectionable types of traffic such as trucks and ambulances would be introduced into the area; that hospital

would bring objectionable noise and possibly smoke (JA 55); and that many homes in the area would look directly into a large parking lot and the boiler room of the hospital (JA 98-99 and 108).

Respondents offered no evidence to refute this testimony.

Also it is general knowledge among zoning officials as set forth in the statement of Edward M. Bassett that hospitals have many objectionable features.[4]

(7) The finding that rezoning is in accordance with the zone plan as required by act of Congress is fully supported. The evidence before the Zoning Commission included the report of the Zoning Advisory Council (JA 51-53) and the testimony of Earl S. Draper, pointing out that there could be no zoning justification to allow the Residential "A" (permitting apartment houses, hospitals, etc.) zoning to project like a "sore thumb" into a Residential "A-Restricted" area (reserved essentially for detached homes) (JA 59).

It should be borne in mind that the members of the Zoning Commission made a view of the property involved (JA 559).

Because respondents contended that the zoning boundary was not in accordance with a "comprehensive plan" or "zone plan" as required by the Act of Congress, the Court received additional evidence on this point. Petitioners made no objection to this additional testimony, but submit its consideration must be restricted to the point as to whether the Zoning Commission exceeded its statutory jurisdiction. The District Court made no finding on this point.

The petitioners' testimony before the District Court on this point and in support of the Zoning Commission's action, consisted of the expert testimony of witnesses Nolen and Lovelace, planning experts. They express the opin-

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[4] Zoning, Edward M. Bassett, pp. 70-71 (published by Russell Sage Foundation, 1940).

tion that the rezoning by the Commission is consistent with a comprehensive plan pointing out (a) that Nebraska Avenue, is located on the top of a ridge and the land to either side slopes down from Nebraska Avenue thus making a logical boundary from a topographic point of view (JA 445-447, 450-451); (b) that the rezoning protects established land uses because the single family character of the area is fixed by the many dead ends, short, narrow, and winding streets designed for handling neighborhood traffic only, and is not designed to handle traffic generated by a hospital (JA 451-454); and (c) that the rezoning for policy reasons was desirable from the point of view of reducing apartment zoning now four times too much for the City's zoning needs (JA 447-448, 486).[5]

(8) The Zoning Commission also found that the use of the American University's property for university purposes would be unaffected by the rezoning (JA 53). The rights of the American University to use its property for university purposes would be unaffected by the rezoning (JA 53). The rights of the American University to use its property for university purposes are identical under either Residential "A" or Residential "A-Restricted" zoning, as provided in Section XXIII, Part 2, paragraph 1, page 39 of the Zoning Regulations (Appendix B, pages 38-39).

(9) The finding that the retention of apartment house zoning upon part of the University Campus constituted an obvious zoning mistake was not refuted by respondents. The courts below should have upheld the rezoning upon this point alone.

In support of the proposition that the rezoning would bear a substantial relationship to the promotion of public health, the petitioners introduced substantial testimony on this point by Doctors Lewis, Cross, Seckinger, and Ramsey. Among the factors to be considered in the promotion of

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[5] Washington, Present and Future; published by the National Capital Planning Commission, Washington, D. C., April 1954, p. 18.

public health is the establishment of hospitals where needed. The unrefuted testimony showed that the hospital should not be relocated in the Spring Valley area, already well served, but in the Southeast or downtown portion of the city not now adequately served (JA 120-123). This is important to the zoning plan just as it is essential to make provisions to properly locate apartments, first commercial, industrial and other uses essential to the zoning plan for a modern metropolitan area.

The evidence before the Zoning Commission also showed that the corporation operating Sibley Hospital did not become the owner of a part of the American University campus until January 2, 1953 (JA 8), which was after the Zoning Commission had advertised the public hearing which commenced January 5, 1953, and further, Sibley Hospital had paid no consideration for the land (JA 262), although it proposed to pay the respondent, Equitable Life Insurance Company, some unnegotiated and undetermined amount to have the land released from a deed of trust dated August 27, 1952, from respondent American University to respondent the Equitable Life Insurance Company of Washington, D. C., to secure repayment of a loan (JA 262). The respondent Equitable Life Insurance Company, through its president, stated that it made the loan to American University based upon Residential "A" zoning, but admitted to the Zoning Commission that it had received information that the Zoning Commission might rezone the property to Residential "A-Restricted" if the property were used for other than university purposes (JA 241-242).

The two real estate expert witnesses for the Insurance Company, on cross examination, testified that the value of the American University campus would be the same if apartment houses were erected thereon as its value now is for university purposes (JA 237 and 249). Therefore, as long as the property is used for university purposes, there will be no loss in security or value.

The respondents, shortly after the Zoning Commission entered its order rezoning the portion of the American University campus zoned Residential "A" to Residential "A-Restricted", filed an action in the United States District Court to have the order set aside and to restore the Residential "A" zoning. The District Court received into evidence at the beginning of the trial the entire record of the proceeding before the Zoning Commission. The District Court held that it had the right to receive additional evidence on the constitutional issue involved and thereupon took testimony. The District Court held that it was not the function of the Court to determine whether the Zoning Commission had deviated from statutory requirements or limitation and whether the findings of facts were sustained by substantial evidence (JA 41). The District Court held that the action of the Zoning Commission violated the property rights of the American University under the Fifth Amendment to the Constitution of the United States. Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the decision of the District Court was affirmed. Neither the Circuit nor the District Court opinions specified in what respects the rezoning order violated the Fifth Amendment. No standards were laid down by either court to serve as a guide for future action. The Zoning Commission cannot be advised by reading these two opinions, in any case involving rezoning to a more restrictive classification, whether its action meets constitutional requirements. The proper functioning of the Zoning Commission for the Nation's Capital is thereby left by both the District Court and the Court of Appeals in a state of uncertainty as to the constitutional limitations applicable to rezoning.

FORM AND HISTORY OF ACTION SHOWING JURISDICTION IN DISTRICT COURT

The respondents, pursuant to Title 11, Section 306, et seq. of the District of Columbia Code (1951 Ed.), filed an action in the United States District Court for the District

of Columbia, on March 2, 1953, against the members of the Zoning Commission of the District of Columbia to set aside the action of the Zoning Commission; and on March 7, 1953, filed an amendment to the complaint (JA 2-19). The members of the Zoning Commission filed an answer (JA 19-26). Petitioners filed a motion for leave to intervene, being nearby property owners and participants in the hearing before the Zoning Commission, and were granted permission by order of the District Court to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. (JA 26-28). The intervenors thereafter filed their answer (JA 28-31). The judgment of the District Court setting aside the action of the Zoning Commission was entered June 30, 1953 (JA 46).

The petitioners noted an appeal from this decision to the United States Court of Appeals for the District of Columbia Circuit on July 28, 1953, pursuant to Title 28, U.S.C. (Rev.), Section 1291.

REASON FOR GRANTING WRIT

I.

Following this Court's decision in the landmark case of *Euclid City* v. *Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 Sup. Ct. 114, in which this Court upheld the constitutionality of zoning, the application and importance of zoning has increased greatly. Although the Euclid City case and subsequent decisions of this Court have clarified the constitutional limitations applicable to original zoning of land, the same is not true with respect to rezoning. This Court has never decided a case involving the powers and limitations of a zoning body in rezoning land. The absence of a decision by this Court on this point has created a large void in the law of zoning as will readily appear below. In recent years, zoning commissions have found it increasingly necessary to rezone land in order to meet changing conditions in a neighborhood, or to correct past mistakes in zoning, or to reflect a change of zoning policy. Aggrieved property owners have in some

instances sought judicial review of these orders of zoning commissions rezoning their land. The decisions of Federal and State Courts are numerous and conflicting. On several occasions petitions for Writs of Certiorari have been filed in this Court to review these decisions. Not one of these petitions, however, sought to have this Court pass upon the constitutional limitations applicable to rezoning. Each petition was denied by this court.[6] This is the first petition in which this Court has been requested to pass upon the constitutional limitations applicable to rezoning. The numerous and conflicting decisions involving rezoning are analogous to the situation which existed before this Court decided the Euclid City case, which, of course, involved original zoning. The decisions of Federal and State Courts that broadly sustain rezoning far outnumber the decisions which narrowly limit rezoning.

The Courts in the following decisions have broadly construed the scope of authority vested in a zoning commission in a rezoning case.

ARIZONA: *Verner* v. *Redman*, — Arizona —, 271 P. (2d) 468 (1954).

CALIFORNIA: *Marblehead Land Co.* v. *City of Los Angeles*, 47 F. 2d 528 Ninth Cir. Cert. denied 284 U.S. 634, 52 Sup. Ct. 18, 76 L. Ed. 540 (1931).

COLORADO: *Fishman* v. *Tupps*, 127 Colo. Rep. 463, 257 P. 2d 579 (May 1953).

CONNECTICUT: *Mallory* v. *Town of West Hartford*, 138 Conn. 497, 86 A. 2d 668 (1952).

DELAWARE: *In Re: Ceresini*, 38 Del. Reports 134, 189 A. 443 (1936).

FLORIDA: *Atlantic Coast Line* v. *City of Jacksonville*, — Florida — 68 So. 2d 570 (December 11, 1953).

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[6] See *Marblehead Land Co.* v. *City of Los Angeles*, 47 F. (2d) 528, 9th Cir., cert. denied, 284 U.S. 634; *Geneva Investment Co.* v. *City of St. Louis*, 87 F. (2d) 83, 8th Cir., cert. denied, 301 U.S. 692; and *Wolpe* v. *Poretsky*, 154 F. (2d) 330, D. C. Cir., cert. denied, 329 U.S. 724; *Standard Oil Co.* v. *City of Tallahassee*, 183 F. (2d) 410, 5th Cir., cert. denied, 340 U.S. 892.

GEORGIA: *Johnson* v. *Evangelical Lutheran Church of Messiah,* 79 Georgia Appeals 671, 54 S.E. 2d 722 (1949).

INDIANA: *Antrim* v. *Hohlt,* 112 Ind. App. 681, 108 N.E. 2d 197 (1952).

KENTUCKY: *Shemwell* v. *Speck,* — Kentucky —, 265 S.W. 2d 468 (1954).

MASSACHUSETTS: *LaMarre* v. *Commissioners of Public Works of Fall River,* 354 Massachusetts 542, 87 N.E. 2d 211 (1949).

MISSISSIPPI: *Holcomb* v. *City of Clarksdale,* 217 Mississippi 892, 65 So. 2d 28 (1953).

MINNESOTA: *Sheffield* v. *City of Minneapolis,* 235 Minnesota 174, 50 N.W. 2d 296 (1951).

MISSOURI: *Geneva Investment Co.* v. *City of St. Louis,* 82 Fed. 2d 83, Cert. denied 301 U.S. 692 (1937).

NEW YORK: *Shepard* v. *Village of Skaneateles,* 300 New York 115, 89 N.E. 2d 619 (1949).

NORTH CAROLINA: *Marren v. Gamble,* 237 North Carolina 680, 75 S.E. 2d 880 (1953).

OKLAHOMA: *Hubbard* v. *Oklahoma City,* 177 Oklahoma 263, 58 P. 2d 547 (1936).

RHODE ISLAND: *Rhode Island Home Builders* v. *Budlong,* 77 Rhode Island 147, 74A 2d 237 (1950).

TEXAS: *Kenny* v. *Kelly,* 254 S.W. 2d 535 (1953).

UTAH: *Dowse* v. *Salt Lake City,* — Utah —, 255 P. 2d 723 (1953).

WASHINGTON STATE: *Miller* v. *Caine,* 40 Washington 2d, 216, 242 P. 2d 505 (1952).

WISCONSIN: *Eggebeen* v. *Sonnenburg,* 239 Wisconsin 213, 1 N.W. 2d 84 (1941).

In a number of the decisions cited above the courts held that the same relationship to the promotion of public health, welfare, and safety exists between original zoning as in rezoning. These courts also held that no vested rights are acquired under original zoning. Further, that constitutional limitations do not prohibit zoning authorities from rezoning land (a) to meet changed conditions in the zoned

area, or (b) to correct obvious mistakes in zoning, or (c) to reflect changes in zoning policy acquired through experience or research.

In sharp conflict with the above decisions are those of State Courts cited below that narrowly limit the authority of zoning commissions to rezone. These decisions place great importance upon vested rights acquired under original zoning. They permit rezoning only in instances involving radical change of neighborhood conditions and reject rezoning designed to correct mistakes in zoning or to reflect changes in zoning policy.

ALABAMA: *Phillips* v. *City of Homewood,* 255 Alabama 180, 50 So. 2d 267 (1951).

ARKANSAS: *City of Little Rock* v. *Bentley,* 204 Arkansas 727, 165 S.W. 2d 890 (1942).

NEBRASKA: *Davis* v. *City of Omaha,* 153 Nebraska 460, 45 N.W. 2d 172 (1950).

NEVADA: *Primm* v. *City of Reno,* — Nevada —, 252 P. 2d 835 (1953).

NEW HAMPSHIRE: *Edgewood Civic Club* v. *Blaisdell,* 95 New Hampshire 244, 61 A. 2d 517 (1948).

PENNSYLVANIA: *Rex* v. *Burrough Lansdale,* 68 Montge. 186 Pa. Quar. Sess. (19—).

In the following jurisdictions, the law is in a state of conflict:

ILLINOIS: Compare *Trust Co.* v. *City of Chicago,* 408 Illinois 91, 96 N.E. 2d 499, with *Miller Brothers Lumber Co.* v. *City of Chicago,* 414 Illinois 162, 111 N.E. 2d 149 (1953).

MARYLAND: Compare *Wakefield* v. *Kraft,* 202 Maryland 136, 96 A. 2d 27 (1953) with *American Oil Co.* v. *Miller,* — Maryland —, 102 A. 2d 727 (1954).

NEW JERSEY: Compare *Tulsa Oil Co.* v. *Morey, et al.,* 137 NJL 388, 60 A. 2d 302 (1948) with *Monmouth Lumber Co.* v. *Township of Ocean,* 9 N.J. Rep. 64, 87 A. 2d 9 (1952).

OHIO: Compare *Clifton Realty Co.* v. *City of Cincinnati,* 60 Ohio Appeals 443, 21 N.E. 2d 993 (1938) with *Henie* v. *City of Euclid,* 118 N.E. 2d 682 (1954).

The Courts below in the present case, rejected the line of decisions that broadly uphold rezoning and held that the university acquired vested rights under the original zoning. These Courts rejected the authority of the Zoning Commission to rezone land when the commission found that rezoning would promote the public health, safety and the general welfare of the inhabitants of the affected areas, or of the city as a whole for the following reasons: (a) change in conditions in the neighborhood, (b) mistake in the original zoning, or (c) change in zoning policy.

Evidence was presented on each of these points, some of which was unrefuted.

It is submitted that there is a direct conflict as to the constitutional limitations applicable to rezoning among various Federal and State Courts including the decision of the Courts below in the present case. This is a substantial and important question of law that has not been determined by this Court. It is respectfully submitted it should be decided by this Court. This presents a basis upon which this Court may grant certiorari.

II.

This court, in the case of *Euclid City* v. *Ambler,* 272 U.S. 365, 71 L.Ed. 303; 47 Sup.Ct. 114, held that apartment houses could be excluded from an area restricted essentially to single-family homes under an original zoning ordinance. The Courts below concluded that this decision did not apply in the case of REZONING. They held that the action of the Zoning Commission in rezoning part of the American University campus from "Residential A" to "Residential A-Restricted", which removed apartment zoning from an area restricted essentially to single-family homes, bore no substantial relationship to the promotion of public health, safety, welfare or convenience. This decision is in direct conflict with *Geneva Investment Co.* v. *City of St. Louis* (1938), 87 F. (2d) 83, 8th Cir. (1937) in which this court denied certiorari in 301 U.S. 692.

The Court of Appeals for the 8th Circuit held in the case of *Geneva Investment Co.* v. *City of St. Louis, supra,* that the same relationship to the promotion of public health, safety, welfare, and convenience applies both to Original Zoning and Rezoning.

This court must now decide to either grant certiorari in the present case or reject its earlier approval to the decision in the case of *Geneva Investment Co.* v. *City of St. Louis, supra.*

The decisions of the Courts below may not be distinguished from the *Euclid City* v. *Ambler* case because they held that the inclusion of a hospital in the same zoning classification as an apartment invalidated the rezoning whereby both were excluded from a single family home area. To permit such a distinction is contrary to a recent decision of this Court in *Church of Jesus Christ of Latter Day Saints* v. *City of Porterville,* 90 Cal. App. (2d) 656, 203 P. (2d) 823, certiorari denied, 338 U.S. 806. The California Court upheld a zoning classification that prohibited the location of a church in a restricted residential district. This Court in commenting upon that case in *American Communication Association v. Douds,* 339 U.S. 382, pages 397, 398, stated that a municipal authority under a zoning ordinance could exclude churches from a restricted residential district when the location of a church would affect adversely many of the nearby property owners. Petitioners submit, that it is inconceivable that a hospital enjoys a position superior to that of a church. This is especially true upon a review of the facts. The California Courts upheld the exclusion of a church from a residential area because a church generates a considerable amount of vehicular traffic which necessarily deprives the restricted residential area of the peace, quiet, and safety which is characteristic of such areas. In the present case, the respondent, Sibley Hospital, desires to erect a very large eight-story hospital building covering several acres of land. Needless to say, the hospital will operate 24 hours a day,

365 days a year, and will generate considerably more traffic than a church. In addition, emergency vehicles coming to and from the hospital create a safety problem for children and detract further from the peace and quiet of a single family neighborhood.

Petitioners therefore submit that there is a direct conflict involving the present case and the case of *Geneva Investment Co.* v. *City of St. Louis, supra,* which this Court should resolve. This is a basis upon which certiorari may be granted.

III.

The Court below held that the opinion of the District Court was "clearly right" although the District Court substantially departed from the acceptable and usual course of judicial review of an action of an administrative agency as established by this Court.[7] The District Court held "The suit does not even contemplate a judicial review of administrative action to determine whether there was a deviation from any statutory requirement or limitation and whether the findings of fact are sustained by substantial evidence." This error of law was laid bare before the Court of Appeals and petitioners devoted several pages of their brief pointing out to Court below the seriousness of the transgression by the District Court. The Court of Appeals was given every opportunity to correct this error and has not done so. This substantial departure of the Court below from the usual course of judicial procedure calls for an exercise of this Court's power of supervision to correct this error. This gives a basis upon which this Court may grant certiorari.

The court below also permitted the District Court's decision to stand although the District Court refused to require respondents to exhaust their administrative remedy. Again, the court below had ample opportunity to correct

[7] *Kessler* v. *Streckler,* 307 U.S. 22, 83 L.Ed. 1082, and *Tagg Bros.* v. *U. S.,* 280 U. S. 420, 74 L.Ed. 524.

the District Court's decision but made no ruling with respect to the exhaustion of administrative remedies.

The Zoning Regulations of the District of Columbia effective February, 1953, provide at page 39, paragraph 1, (Appendix B pages 38-39) that—colleges and universities may be permitted in residential districts, including Residential "A" or Residential "A-Restricted" without distinction or limitation with respect to the two zoning classifications upon an appeal to the Board of Zoning Adjustment. Therefore, the question whether a hospital or school of nursing is a part of the American University or an appropriate use upon a university campus should first be presented to the administrative agency having jurisdiction, namely, the Board of Zoning Adjustment. The Board of Zoning Adjustment has been by-passed in the present proceeding and appellants believe this to be a very serious legal omission constituting a dangerous precedent and the most obvious failure to exhaust administrative remedy.

IV.

The establishment of zoning classifications is a legislative function delegated by Congress to the Zoning Commission for the District of Columbia and subject only to court review to correct unreasonable classifications. Pursuant to this legislative authority, the Zoning Commission placed a hospital in the Residential "A" classification and prohibited the location of hospitals in restricted residential areas. Zoning authorities in many other cites have similarly excluded hospitals from residential areas. Recently the Superior Court of New Jersey, Appellate Division, in the case of *Hasbrouck Heights Hospital Association* v. *Borough of Hasbrouck Heights,* 90 A. 2d 591, decided October 8, 1953, upheld a zoning classification which excluded a hospital use in a restricted residential area. The Courts below in the present case have substantially departed from the usual judicial procedure in

that they have without authority usurped a legislative function. This Court in its supervisory capacity should correct this substantial departure from the usual judicial procedure. This is a ground for this Court granting certiorari.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for Petitioners.

WILKES, MCGARRAGHY & ARTIS
Of Counsel

APPENDIX "A"

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11942

BRIGADIER GENERAL LOUIS W. PRENTISS, RENAH F. CAMALIER, SAMUEL SPENCER, CONRAD L. WIRTH, DAVID LYNN, As Members of the Zoning Commission of the District of Columbia, APPELLANTS

v.

THE AMERICAN UNIVERSITY, a corporation, ET AL., APPELLEES

No. 11943

ALICE D. WRATHER, ET AL., APPELLANTS

v.

THE AMERICAN UNIVERSITY, a corporation, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided June 10, 1954

Messrs. Harry L. Walker and *John Hampton Baumgartner, Jr.*, Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Vernon E. West*, Corporation Counsel, *Leo A. Rover*, United States Attorney, *Chester H. Gray*, Principal Assistant Corporation Counsel, *Oliver Gasch*, Principal Assistant United States Attorney, and

Milton D. Korman, Assistant Corporation Counsel, were on the brief, for appellants in No. 11942.

Mr. James C. Wilkes, with whom *Messrs. Norman M. Glasgow* and *George A. Glasgow* were on the brief, for appellants in No. 11943.

Messrs. E. F. Colladay and *D. C. Colladay,* with whom *Mr. James R. Stoner* was on the briefs, for appellee The American University. *Mr. Calvin G. Dworshak* entered an appearance for appellee The American University.

Messrs. Paul B. Cromelin and *Thomas M. Raysor* for appellee Lucy Webb Hayes National Training School for Deaconesses and Missionaries.

Mr. Andrew T. Altmann, with whom *Mr. Clyde D. Garrett* was on the briefs, for appellee Equitable Life Insurance Company.

Before EDGERTON, WILBUR K. MILLER, and BAZELON, Circuit Judges.

PER CURIAM: An order of the Zoning Commission of the District of Columbia rezoned the campus of The American University from residential "A" to residential "A restricted". The immediate effect of the order was to prevent the building on the campus of a hospital to be maintained in connection with a School of Nursing.

"The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." Nectow v. Cambridge, 277 U.S. 183, 188. In the District Court, Judge Holtzoff found that the restriction which the rezoning order would impose on the University's right to use its land did not meet this requirement. He therefore found the order unconstitutional, and set it aside, as taking the University's property without due process of law. We think he was clearly right. The judgment of the District Court is

Affirmed.

APPENDIX "B"

§ 5–413 [25: 531]. Zoning regulations to be made by Zoning Commission—Uniformity.

To promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital, the Zoning Commission created by section 5–412, is hereby empowered, in accordance with the conditions and procedures specified in sections 5–413 to 5–428, to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts, and other open spaces, the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes; and for the purpose of such regulation said commission may divide the District of Columbia into districts or zones of such number, shape, and area as said Zoning Commission may determine, and within such districts may regulate the erection, construction, reconstruction, alteration, conversion, maintenance, and uses of buildings and structures and the uses of land. The said Zoning Commission shall also have power to promulgate regulations to require, with respect to buildings erected subsequent to the promulgation of such regulations, that facilities be provided and maintained either on the same lot with any such building, or on the same lot with any such building or elsewhere, for the parking of automobiles and motor vehicles of the owners, occupants, tenants, patrons, and customers of such building, and of the business, trades, and professions conducted therein. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts. (As amended Mar. 4, 1942, 56 Stat. 122, ch. 126.)

§ 5–414 [25: 532]. Purposes of zoning regulations.

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the

street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein. (June 20, 1938, 52 Stat. 797, ch. 534, § 2.)

* * * * * * * * * * *

§ 5–415 [25: 533]. Existing zoning regulations continued until amended — Public hearing on amendments — Notice—Contents.

The regulations prior to June 20, 1938, adopted by the Zoning Commission under the authority of section 5–412 and in force on June 20, 1938, including the maps which at said date accompany and are a part of such regulations, shall be deemed to have been made and adopted and in force under sections 5–413 to 5–428 and shall be and continue in force and effect until and as they may be amended by the Zoning Commission as authorized by said sections 5–413 to 5–428. The Zoning Commission may from time to time amend the regulations or any of them of the maps or any of them. Before putting into effect any amendment or amendments of said regulations, or of said map or maps, the Zoning Commission shall hold a public hearing thereon. At least thirty days' notice of the time and place of such hearings shall be published at least once in a daily newspaper or newspapers of general circulation in the District of Columbia. Such published notice shall include a general summary of the proposed amendment or amendments of the

regulation or regulations and the boundaries of the territory or territories included in the amendment or amendments of the map or maps, and the time and place of the hearing. The Zoning Commission shall give such additional notice of such hearing as it shall deem feasible and practicable. At such hearing it shall afford any person present a reasonable opportunity to be heard. Such public hearing may be adjourned from time to time and if the time and place of the adjournment meeting be publicly announced when the adjournment is had, no further notice of such adjourned meeting need be published. (June 20, 1938, 52 Stat. 798, ch. 534, § 3.)

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§ 5–417 [25: 535]. Zoning Advisory Council—Creation—Membership — Submission of amendments to zoning regulations.

A Zoning Advisory Council is hereby created to be composed of a representative designated by the National Capital Park and Planning Commission, a representative designated by the Zoning Commission of the District of Columbia, and a representative designated by the commissioners of the District of Columbia, all of whom shall be persons experienced in zoning practice and shall serve without additional compensation. No amendment of any zoning regulation or map shall be adopted by the Zoning Commission unless and until such amendment be first submitted to said Zoning Advisory Council and the opinion or report of such council thereon shall have been received by the commission: **Provided, however,** That if said council shall fail to transmit its opinion and advice within thirty days from the date of submission to it, then in such event the Zoning Commission shall have the right to proceed to act upon the proposed amendment without further waiting for the receipt of the opinion and advice of said council. (June 20, 1938, 52 Stat. 798, ch. 534, § 5.)

• • • • • • • • • • •

§ 5–420 [25: 538]. Board of Zoning Adjustment—Creation, membership—Tenure—Regulations to govern organization and procedure — Appeal — Procedure, powers—Majority vote necessary.

A Board of Zoning Adjustment is hereby created which shall be composed of five members appointed by the Commissioners of the District of Columbia, namely, one member of the National Capital Park and Planning Commission or a member of the staff thereof to be designated in either case by such commission; one member of the Zoning Commission or a member of the staff thereof to be designated in either case by such commission; and three other members, each of whom shall have been a resident of the District of Columbia for at least three years immediately preceding his appointment and at least one of whom shall own his own home.

The representative of the National Capital Park and Planning Commission may be changed from time to time by such commission in its discretion and in case of a vacancy in the position by death, resignation, or other disability, a new representative shall be designated by the said commission and appointed by the Commissioners of the District of Columbia to fill said vacancy. The representative of the Zoning Commission may be changed from time to time by such commission in its discretion and in case of a vacancy in the position by death, resignation, or other disability, a new representative shall be designated by the said commission and appointed by the Commissioners of the District of Columbia to fill said vacancy. The terms of the three members designated by the Commissioners of the District of Columbia shall be three years each, excepting that, in the case of the initial appointments, one shall be for a term of one year and one for a term of two years. In case of any vacancy in the position of any of the three members designated by the Commissioners of the District of Columbia, the same shall be filled for the remainder of the term.

The Zoning Commission may provide and specify in its zoning regulations general rules to govern the organization and procedure of the Board of Adjustment not inconsistent with the provisions of sections 5–413 to 5–428, and the Board of Adjustment may adopt supplemental rules of procedure which shall be subject to the approval of the Zoning Commission after public hearing thereon as provided in section 5–415. The Board of Adjustment shall choose its chairman and its other officers. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings showing the vote of each member upon each question, of if absent or failing to vote indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

The regulations adopted by the Zoning Commission may provide that the Board of Adjustment may, in appropriate cases and subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the regulations, make special exceptions to the provisions of the zoning regulations in harmony with their general purpose and intent. The commission may also authorize the Board of Adjustment to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines or similar questions as they arise in the administration of the regulations.

The Board of Adjustment shall not have the power to amend any regulation or map.

Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the federal government affected, by any decision of the inspector of buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or part upon any zoning regulation

or map adopted under sections 5–413 to 5–428. The Commissioners of the District of Columbia may require and fix the fee to be charged for an appeal, which fee shall be paid, as directed by said commissioners, with the filing of the appeal: **Provided,** That no citizens' association, or association created for civic purposes and not for profit shall be required to pay said fee. There shall be a public hearing on appeal.

Upon appeals the Board of Adjustment shall have the following powers:

(1) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by the inspector of buildings or the Commissioners of the District of Columbia or any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to sections 5–413 to 5–428.

(2) To hear and decide, in accordance with the provisions of the regulations adopted by the Zoning Commission, requests for special exceptions or map interpretations or for decisions upon other special questions upon which such board is required or authorized by the regulations to pass.

(3) Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under sections 5–413 to 5–428 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

(4) In exercising the above-mentioned powers the Board of Adjustment may, in conformity with the provisions of sections 5–413 to 5–428 reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken.

The concurring vote of not less than a full majority of the members of the board shall be necessary for any decision or order.

Nothing herein contained shall prohibit the Zoning Commission from providing by regulation for appeals to it from any action of the Board of Zoning Adjustment. (June 20, 1938, 52 Stat. 799, ch. 534, § 8.)

USE AND OCCUPANCY TABLE

MAIN REGULATIONS

[Frame houses can be built only in the "A", "A" R, and "A" SR areas]

REGULATIONS INVOLVED

Area	Lot occupancy (per cent)		Side yards and courts: Class	Inches per foot of building: Length	Height	Min. width (feet)	Rear yards: Class	Minimum area (per cent)	Inches per foot of building height	New buildings in residential districts: Apartment house	Boarding house	Club or fraternity	Church	Community house	Detached houses	Educational institution	Farm, greenhouse, etc.	Flat	Garage, public storage	Hospital, etc.	Hotel	Lodging or rooming house	Passenger station	Philanthropic or eleemosynary institution	Row house	Semi-detached dwelling
"A"R	Interior	40	Side yard	2	2	5	Corner	15	5	No [7]	No	No	Yes	Yes [5]	Yes	Yes [6]	No	No	No	No	No	No [7]	Yes	No	No	Yes [8]
	Corner	50	Open court	2½	2½	5	Interior	15																		
	Triangular	60	Inclosed court		3	6																				
"A"	Interior	40	Side yard	2	2	5	Corner	15	5	Yes	Yes	Yes	Yes	Yes	Yes	Yes [6]	Yes	Yes	Yes	Yes [4]	Yes	No	Yes	Yes	Yes [7]	No	Yes
	Corner	50	Open court	2½	2½	5	Interior	15																		
	Triangular	60	Inclosed court		3	6																				

[1] Residential building in "D" area must conform to "C" area requirements.
[2] Buildings not used for dwelling purposes, 2 inches.
[3] Horizontal plane 20 feet above curb for buildings other than dwellings, tenements, or apartments in residential district.
[4] In an apartment house. A parking garage in 90 foot "C" & "D" areas if approved by B. Z. A.
[5] With the approval of the Board of Zoning Adjustment, when located adjoining or separated by an alley from "A", or lower area.
[6] A college, university or school; and in "C" & "D" area districts only a non-profit organization—Board of Zoning Adjustment approval required in each instance.
[7] Three or 4 roomers or boarders until 6/30/50; more than 4 roomers or boarders with approval of the Board of Zoning Adjustment until 6/30/50.
[8] With the approval of the Board of Zoning Adjustment.

SECTION III—*Residential district*

In the residential district all buildings and premises, except as otherwise provided in these regulations, shall be erected for and used exclusively as—

1. Dwellings.

2. Apartment houses, flats, and tenements in the "A", "B", "C", and "D" area districts, and in the "B" restricted area district as provided in section XVI (a). (As amended June 30, 1936.)

3. Hotels in the "B", "C", and "D" area districts having not less than 30 rooms reserved exclusively for transient guests, and where food, drinks, or refreshments are prepared and sold to be eaten in a restaurant on the premises where sold: Provided, such restaurant is located entirely within the building with no entrance from the street, and no part of said restaurant or the entrance thereto is visible from a sidewalk, and provided further, that there shall be no sign or display indicating the existence of such restaurant visible from the outside of the building. (As amended June 30, 1936, June 6, 1942 and June 9, 1944.)

3. (a) Commercial uses which distinctly pertain to or are appropriate adjuncts to hotels as follows: Drug stand, including soda fountain, perfumery shop, florist shop, barber shop, beauty parlor, pressing or tailoring establishment, cigar or news stand, and uses similar to those enumerated in this paragraph, may be established in hotels in the residential district when approved by the Board of Zoning Adjustment as provided in Section XXIII. (June 6, 1942.)

4. Lodging or boarding houses in the "A", "B", "B" restricted, "C", and "D" area districts. (As amended June 30, 1936.)

5. Churches.

6. Private clubs, fraternities, and lodges in the "A", "B", "C", and "D" area districts, except those the chief activity of which is a service customarily carried on as a business. (As amended Mar. 21, 1924, and June 30, 1936.)

7. Hospitals, sanitariums, and clinics for human beings in the "A", "B", "C", and "D" area districts. (As amended Feb. 28, 1922, Feb. 21, 1924, and June 30, 1936.)

8. Transportation rights of way. (As amended December 3, 1941.)

9. Farms, trucks, gardens, nurseries, and greenhouses, except in the "A" restricted area district. (As amended June 30, 1936.)

10. Accessory buildings and uses of property customarily incidental to uses other than dwelling uses which are permitted in a residential district, when located on the same lot and not involving the conduct of a business on the premises. (As amended June 30, 1936.)

The following usual accessories of a residence located on the same lot with that residence and not involving the conduct of a business shall be allowed:

(a) The office of a physician, dentist, or other persons residing on the premises and including home occupations, engaged in by the occupants of a dwelling, not involving the conduct of a business on the premises, provided that no window display nor any sign other than a name plate not exceeding 1 square foot in area and bearing only the name and occupation of the occupant shall be allowed as appertaining to use as offices or for home occupation as permitted under this section.

(b) A private garage located in a fireproof compartment within, adjoining, or forming an addition to a building, or both, provided that the total private garage storage facilities on any one lot shall not exceed 900 square feet in area. (As amended May 7, 1928, Oct. 20, 1932, June 30, 1936, and April 12, 1950.)

(c) A private garage located in the rear yard with a dwelling, and not less than 10 feet from any point of such dwelling nor less than 20 feet from the building line of any street upon which the lot abuts; provided that if the lot will not permit a garage to be located in conformity with this regulation a garage may be approved by the Board of

Zoning Adjustment, as provided in Section XXIII of these regulations; and provided further that the total private garage storage facilities on any one lot shall not exceed 900 square feet in area. (As amended Oct. 20, 1932, June 30, 1936, June 7, 1940, and April 12, 1950.)

(d) A public storage garage in an apartment house, where the floor area of said garage does not exceed one-fourth of the total floor area designed for use or used by the tenants; provided the vehicular entrances or exits are located 75 feet or more back of the building line of the nearest street, or are so located that dangerous traffic or otherwise objectionable conditions, as may be determined by the Board of Zoning Adjustment as provided in section XXIII of these regulations will not be created. (Feb. 5, 1930, amended June 30, 1936 and Oct. 10, 1938.)

(e) Open parking spaces accommodating motor driven vehicles of the persons residing in the building or buildings on the premises, provided no part of such parking space which is located on the same lot with the building it is intended to serve shall be permitted within ten feet of the outside walls of the building; and provided further that any such parking space between the outside walls of a building and the line of any street upon which the lot abuts shall require the approval of the Board of Zoning Adjustment, as provided under Paragraph 26, Part 2, Section XXIII of these regulations. (February 13, 1943, as amended July 29, 1949.)

11. A private garage which is not appurtenant to any of the above uses and housing not more than two motor driven vehicles, nor exceeding 450 square feet in area, if located 50 feet or more back of the building line of the nearest street, and abutting and opening directly upon a public alley. (As amended Oct. 20, 1932, June 30, 1936, and April 12, 1950.)

12. In the "A", "B", "B" restricted, "C", and "D" area districts, a public-storage garage, or the temporary parking of motor vehicles on an alley lot, so recorded on the

records of the Surveyor, District of Columbia, January 1, 1928, when no part of such garage or the space for such parking is located within 75 feet of any street building line, and when vehicular entrances and exits open directly on a public alley. (As amended Feb. 13, 1932 and June 30, 1936.)

13. Temporary use of premises by fairs, circuses, or carnivals, upon compliance with the police regulations of the District of Columbia. (Oct. 10, 1938.)

14. Public schools, municipal recreational uses, pumping stations, and fire-engine houses may be erected in any use district, provided that in the case of a fire-engine house, located in a residential district, a public hearing shall first be held by the Commissioners of the District of Columbia. Police stations shall be located only in commercial or industrial districts. (September 18, 1929, as amended June 9, 1944.)

[NOTE: See Section XXIII of these regulations for other uses which may be approved in the residential district by the Board of Zoning Adjustment.]

* * * * * * * * * *

Part 2

Powers Relative to Exceptions and Special Questions

Upon appeals the Board of Zoning Adjustment is hereby empowered to grant requests for the following special exceptions, when, in the judgment of the Board, such exceptions shall be in harmony with the general purpose and intent of the zoning regulations and maps and will not tend to affect adversely the use of neighboring property in accordance with the zoning regulations and maps:

1. Permit, in a residential district, a college, a university or a private school, and in the 'A", "B", "C" and "D" area districts a kindergarten or pre-school group, if (a) its operation would be impaired by location on a business street, (b) it has no articles of commerce for sale, and (c) it is not likely to become objectionable in a residential district because of noise, traffic, and number of students. The Board may permit a kindergarten or a pre-school group in the

"A" Restricted, "A" Semirestricted, and "B" Restricted Area Districts, subject to the conditions above, and provided further; that there shall be provided on the same lot with such use not less than 100 square feet of play area for each child; that the activities to be conducted in the proposed establishment shall be so located with respect to adjoining and nearby property as not to create undue noise or otherwise objectionable conditions; and the Board shall find the use to be reasonably necessary or convenient to the neighborhood in which located.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 411

ALICE D. WRATHER, ET AL., *Petitioners*,

v.

THE AMERICAN UNIVERSITY, ET AL., *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals is reported in 214 F. 2d 282, and in 82 The Washington Law Reporter, 1061; the Opinion of the District Court is reported in 113 F. Supp. 389, and in J.A. 34.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The Respondents do not desire to restate the questions presented in the Petition for the Writ of Certiorari. They consider the statements of those questions in the Petition insufficient to justify this Court in granting the Writ of Certiorari.

STATUTES AND REGULATIONS INVOLVED

In addition to the citations in the Petition to the District of Columbia Code and the Zoning Regulations of the District of Columbia, Respondents rely upon Section XIV (a)(4) of the Zoning Regulations of the District of Columbia, the pertinent parts of which are printed in the Appendix to this Brief; Rule 52(a) of the Federal Rules of Civil Procedure, printed in the Appendix to this Brief; and the Acts of Congress as follows: The Act approved February 24, 1893 (27 Stat. L. 476); the Act approved August 7, 1946 (60 Stat. L. 896); the Act approved July 15, 1952 (66 Stat. L. 637); and the Act approved August 1, 1953 (67 Stat. L. 359). The Acts approved February 24, 1893 and August 1, 1953, are printed in full in the Appendix to this Brief and the pertinent parts of the Acts approved August 7, 1946, and July 15, 1952, are also printed in the Appendix to this Brief.

DESCRIPTION OF RESPONDENTS AND THE LAND INVOLVED

* Respondents are The American University (hereinafter sometimes referred to as the "University"), a corporation which maintains and conducts "a university for the promotion of education" within the District of Columbia, the same being operated under the auspices of The

* For the convenience of the Court references hereinafter abbreviated are as follows: Petitioners' Appendix, P.A. —; Respondents' Appendix, R.A. —; Joint Appendix, J.A. —; Transcript of Proceedings before District Court, Tr. —; Transcript of Proceedings before Zoning Commission, Z.C. Tr. —.

Methodist Church; Lucy Webb Hayes National Training School for Deaconesses and Missionaries (hereinafter sometimes referred to as "Sibley"), a charitable corporation, which also operates under the auspices of said Church a school of nursing known as "Lucy Webb Hayes School of Nursing" and a hospital known as "Sibley Memorial Hospital"; and the Equitable Life Insurance Company, a corporation (hereinafter sometimes referred to as "Equitable"), which holds a deed of trust secured on the campus of the University.

The land, which was upgraded and rezoned by order of the Zoning Commission on January 28, 1953 (hereinafter referred to as the Order), is part of the campus of the University (hereinafter referred to as the Campus Tract; see Exhibit "A" to the Complaint, J.A. 16). The Campus Tract comprises approximately seventy (70) acres of land and includes approximately 7.8 acres which on December 31, 1952, were conveyed by the University to Sibley as a gift, to be used by Sibley for the construction of a school of nursing and hospital, for use of the general public, with an access road to said site from Rockwood Parkway at a point near Nebraska Avenue. Said Campus Tract which was upgraded by the Order is "located within the area bounded by Massachusetts Avenue, Nebraska Avenue, Rockwood Parkway and University Avenue, N. W." (Order J.A. 17). There is a "single family area to the south and west." (Zoning Advisory Council Report, J.A. 52). To the north of the Campus Tract there is an exceptionally heavily travelled and wide boulevard, namely, Massachusetts Avenue, on the north side of which are located buildings and campus of the University. There are no private homes on the north side of the Campus Tract. To the east of the Campus Tract is the arterial highway known as Nebraska Avenue, on the east side of which is located unimproved land zoned Residential "A", permitting the construction of apartment houses, and land occupied by the Metropolitan Memorial Methodist Church, but no private homes.

CORRECTIONS OF PETITIONERS' STATEMENT OF THE CASE

The statement that "colleges and universities may be located and be maintained and expanded in either residential 'A' or residential 'A Restricted' zones without any different limitations applying as between these two zoning classifications", is erroneous. (Petition, Page 7).

Under Section 23 of the Zoning Regulations cited in the footnote of petitioners' brief it would be necessary for the University to apply to the Board of Zoning Adjustment for a permit to build a University building of any kind other than a single detached dwelling house on any property of its campus zoned "A Restricted". The Zoning Advisory Council membership at the time it made its Report involved in this case consisted of Robert O. Clouser, Director of Planning; John Nolen, Jr., Director, National Capital Planning Commission; and Colonel Harry F. Hansen, Assistant Engineer Commissioner. It is dominated by the Director of Planning of the Zoning Commission who, in this case, wrote the Council Report and discussed it with the other two members of the Council over the telephone after sending them copies of his written draft of the Report. There was no meeting of the Council. The Report thus drafted before consultation with the other two members of the Council was approved by them without any conference other than over the telephone (J.A. 454, 455).

It is incorrect to represent the Report of the Zoning Advisory Council as a finding. There is no showing in the record of the taking of any evidence by the Council or of any investigation made by it or any joint meeting or conference by the three members of the Council, nor of any opportunity given to the respondents, The American University, Sibley Memorial Hospital, and Equitable Life Insurance Company, to say anything to the Council (J.A. 456).

The several alleged findings by the Zoning Advisory Council numbered 1 to 7 inclusive were dealt with in the hearing before the Zoning Commission and the hearing before the United States District Court and were substantially refuted. We will point out necessary corrections in these in the order in which they are discussed in the petitioners' statement of the case, but as number 7 is not further discussed in that statement, we point out here that the original zoning of the university campus could not have constituted "an obvious mistake in the original zoning", because the area surrounding the campus was not developed at the time of the original zoning. Spring Valley was a woods and all other adjacent property was in the nature of open fields. (Plaintiffs' Exhibits Nos. 36 and 42, Tr. 500).

The statement that the Zoning Commission adopted the Report of the Zoning Advisory Council "as its findings", is misleading. The minutes of the Zoning Commission show a supplementary statement after the portion of the minutes in which the Commission approved the change of zoning petitioned for in these words: "The Commission also adopted the Report of the Zoning Advisory Council" (J.A. 559).

Petitioners further state "this is a practice long followed and is the same procedure followed by the Zoning Commission in the case of *Lewis* v. *District of Columbia*". In that case the Court of Appeals merely stated, "It (the Commission) adopted the Report and recommendation of the Zoning Advisory Council, which concluded that the proposed change was undesirable and unjustified * * *" 89 App. D.C. 72; 190 F. 2d 25 at Page 27. The Court did not say that such adoption of the Report and recommendation made the contents of the Report findings of fact.

In the present case the District Court Judge in his opinion stated that the Zoning Commission made no findings of fact. Notwithstanding this, counsel for the petitioners proceeds to treat each and every statement in the Report of the Zoning Advisory Council as a finding made by the

Zoning Commission, and seeks to sustain them as such. In doing so, the petitioners have made many errors which we shall endeavor to correct, using the same numbers as counsel for the petitioners has used.

1. The re-zoning of the University campus was not consistent with past zoning history and development in the area. The history of the zoning of the campus shows that in the original zoning of the District (1920) it was zoned Residential "A" and continued so until the entry of the Order of the Zoning Commission on January 28, 1953, which the District Court has set aside. The only variation from this historic situation is the zoning, with the consent of the University, of two narrow strips of its campus land on either side of Massachusetts Avenue; the remainder of the campus (comprising about 70 acres) has been under a continuous development for University purposes since such original zoning in 1920. The change in conditions has consisted entirely in the sub-dividing by real estate promoters of the nearby forest and fields and the erection thereon of residences, which development gradually approached the high promontory on which the University as the first settler had chosen to establish itself at the time of its chartering by Special Act of Congress in 1893. This history of the university was developed in the evidence before the Zoning Commission (J.A. 255, 256), and that evidence was also before the District Court (J.A. 266(b)—270).

2. The testimony of the alleged traffic expert, Charles M. Upham, as to traffic perils, was completely refuted by the testimony given in the Court by Burton H. Sexton, Traffic Department Engineer of the Capital Transit Company and Alvin B. Barber, former Chief of Transportation for the United States Chamber of Commerce, and chairman of the Traffic Committee of the Washington Board of Trade, and at the time of testifying, he was in a consulting capacity (J.A. 335—343 and 360). These

witnesses showed that the increase in traffic would be negligible and would amount to nothing that could not be dealt with successfully by up-to-date traffic control methods.

3. The testimony of Earl S. Draper, treated under this number, is also refuted by the testimony of the witnesses Sexton and Barber. Their testimony was based upon actual traffic counts made by Mr. Sexton and officially established traffic tables.

4. The testimony of the residents as to traffic was likewise refuted by the testimony of witnesses Sexton and Barber. In the last paragraph on page nine petitioners' counsel refers to the testimony of the witness Justement as the only testimony on the point in question. Mr. Justement testified both at the Zoning Commission and at the hearing in the District Court. The witnesses Sexton and Barber testified in the District Court but not before the Zoning Commission. It was upon their testimony that the District Court made its findings with regard to traffic.

5. The testimony of J. Rupert Mohler to the effect that the values of the several residence properties would be depreciated by the erection of the hospital was speculative, as the District Court Judge pointed out; and subsequent events, which are matters of common knowledge and therefore proper subject of judicial notice, refuted it entirely. It is well known that additional residences have been built and sold at high prices in Spring Valley since the Order of the Zoning Commission of January 28, 1953, and that there is an active market for residence properties in that locality, as appears in the real estate sections of the Washington newspapers every Saturday and Sunday. The witness Throckmorton testified that outside of a possible state of mind—inconvenience to the people, there would be no difference in valuation. When asked whether he meant to testify that not one single house in the area would be reduced in its fair market value, he answered that

"there can be an exception to all rules." (J.A. 250). The District Court's findings on this point were based on the testimony of witness Throckmorton at the hearing before the Zoning Commission (J.A. 246—253), and his testimony and that of the witness Owen in the District Court (J.A. 379—380; 385—386; and 391).

6. This point was dealt with by Bishop Oxnam (J.A. 146—147); the witness Justement (J.A. 55, 117, 171—178); Sister Olivia Gowan (J.A. 213—218); Dr. Oscar B. Hunter, Jr., (J.A. 193—199); Dr. John M. Orem (J.A. 417—432); and Dr. Maurice E. Protas (J.A. 404, 405). These refuted the testimony of witness Draper.

The reference to the book of Edward M. Bassett is not comprehensive. Mr. Bassett pointed out on page 71 of his work that the objections to the location of hospitals in a residence district can have but one answer, namely, "like schools and churches, they were allowed in residence districts as a matter of right".*

7. Here the counsel for petitioners refers to a part of the Report of the Zoning Advisory Council as a finding "that re-zoning is in accordance with the Zone Plan as required by the Act of Congress". He then cites that same Report as evidence to support that alleged finding. The only other testimony he refers to is that of the witness Draper.

Neither the said Report nor said testimony discloses the existence of a Zone Plan including the change of the University's campus from Residential "A" to Residential "A Restricted". In fact, no such Plan ever existed. The official Plan up to the time of the making of the Order of the Zoning Commission on January 28, 1953, showed the University's campus zoned Residential "A", excepting the narrow strips on Massachusetts Avenue. *That Order was an attempt to change the official Plan, not to do some-*

* Zoning, Edward M. Bassett, published by Russell Sage Foundation, 1940.

thing in accordance with it. Again we have the reference to the university campus projecting "like a sore thumb into a Residential 'A Restricted' Area". The University *could not* project its property into the residential area which did not exist from the time of its original location there in 1893 to the first sub-division of the surrounding property in about 1925 (J.A. 84).

In the petition it is noted that the members of the Zoning Commission made a view of the property involved. It should also be noted that the District Court Judge viewed the campus property, the proposed hospital site and the residential area represented by the petitioners, in the presence of counsel for all parties to the litigation (J.A. 343).

Counsel for the petitioners states that "because the respondents contended that the zoning boundary was not in accordance with a 'Comprehensive Plan' or 'Zone Plan' as required by the Act of Congress, the Court received additional evidence on this Point". Counsel further says that petitioners made no objection to this additional testimony, but submits that its consideration must be restricted to the point as to whether the Zoning Commission exceeded its statutory jurisdiction, and he says the District Court made no finding on this point.

The District Court made no finding on this point because the point was not raised, and we may add it was not raised in the District Court nor the Circuit Court of Appeals. There was no restriction laid by the District Court upon the receipt by it of the testimony as to whether there was a Comprehensive Plan. The petitioners contended before the District Court that the Nebraska Avenue border of the University's campus property was a zoning boundary but up to the time of the making by the Zoning Commission of its Order of January 28, 1953, it was not and could not be such a boundary.

The Comprehensive Plan from the beginning of zoning in the District of Columbia in 1920 down to and including

the time covered by this litigation consisted only of a set of Baist's Atlases showing all the land in the District of Columbia, which atlases consisted of four bound volumes of maps, one map as an index showing the whole District of Columbia, and the other pages showing various sections of the District. On the maps in those atlases the original zones were marked out and all subsequent changes have been made thereon. When this litigation arose, the University's campus property was included in the area marked on those atlases as "A Residential". There was no zoning boundary along Nebraska Avenue in the Plan on those atlases. Those atlases are identified in the Order of the Zoning Commission in this case in the following language:

"January 28, 1953

"ORDERED:

"That after public notice and hearing as prescribed by law, the following district heretofore established by the Zoning Commission of the District of Columbia, as shown in the official height, area, and use atlases, is hereby modified and amended as follows:

(* * *)" (J.A. 17).

The testimony given by petitioners' expert witnesses Nolen and Lovelace did not deal with the official Comprehensive Plan on said plat books, but only with a Plan which *might be made,* and with the Plan prepared and recommended by the National Park and Planning Commission. Their discussion of Nebraska Avenue *as a logical boundary did not deal with an existing official boundary* apart from the effect of the Order of the Zoning Commission made January 28, 1953. Their testimony was refuted by the testimony of the respondents' witnesses McCrosky and Tuemmler (J.A. 315—325 and 399).

The statement in the petition that apartment zoning is now four times too much for the city's zoning needs is inaccurate. Witness Nolen stated they found that condi-

tion four or five years prior to his testimony. Since that time about six and one-half years have elapsed, and the population of the District of Columbia has greatly increased, necessitating the erection of great numbers of apartment houses which have been filled with tenants.

8. The Zoning Commission made no such finding. A statement to that effect was incorporated in the recommendation made by the Zoning Advisory Council (J.A. 53), but as the District Court Judge said in his opinion: "No findings were made. No statement of reasons was issued." (J.A. 39). Again, he said "Parenthetically it may be remarked that there are no findings of fact to review." (J.A. 41).

Counsel for the petitioners alleges that the Zoning Commission found that the use of the University's property for University purposes would be unaffected by the re-zoning, and that its rights to use its property for University purposes are identical under either Residential "A" or Residential "A Restricted" zoning and cites Section XXIII, Part 2, Paragraph 1, Page 39 of the zoning regulations (Petitioners' Appendix "B" 38-39). This contention is utterly untrue. Under Section XXIII of the zoning regulations cited in the petition, it would be necessary for the University to apply to the Board of Zoning Adjustment for a permit to erect any University building other than a detached residence, and that Board would have the power to deny the application. Such an application would be the subject of a public hearing which might take on the same aspects as the disorderly hearing before the Zoning Commission which preceded and resulted in its Order of January 28, 1953. If subjected to this procedure the University would be greatly hampered and its future jeopardized—it could not raise by solicitation funds for a building which it might never obtain a permit from the Board of Zoning Adjustment to build.

9. Under this number counsel for the petitioners makes the following statement:

> "(9) The finding that the retention of apartment house zoning upon part of the University Campus constituted an obvious zoning mistake was not refuted by respondents. The courts below should have upheld the rezoning upon this point alone."

The Zoning Commission made no such finding. No such statement appears in the Report of the Zoning Advisory Council, nor in the Order of the Commission (J.A. 51-53 and 17).

Counsel for petitioners then cites the testimony of four doctors in support of the proposition that the re-zoning would bear a substantial relationship to the promotion of public health, and states that this testimony was unrefuted and showed that the hospital should not be relocated in the Spring Valley area, but should be in the Southeast or down town portion of the city "not now adequately served". The respondents completely refuted the testimony of the four doctors with the testimony of Dr. Maurice Protas (J.A. 404, 405); Dr. Oscar B. Hunter, Jr., (J.A. 193-198); Sister Olivia Gowan (J.A. 213-218); Bishop G. Bromley Oxnam (J.A. 143-150 and 272-273); Dr. Francis J. Brown (J.A. 208-212); Honorable Charles S. Dewey (J.A. 201); Louis Justement (J.A. 187-190); and Dr. John M. Orem (J.A. 417-427). The testimony of these eight witnesses taken together shows clearly that it would be in the public interest and would bear a substantial relationship to the promotion of public health to have the proposed hospital and school and home for nurses located on the University campus. Three of the four doctors cited by petitioners were residents of Spring Valley and signers of the original petition for re-zoning the University campus.

The statements in the last paragraph on Page 13 can only be true so long as the campus property is zoned "A Residential", which gives it the highest market value,

which is the value of property so zoned as to permit the erection thereon of apartment houses. The Order of the Zoning Commission complained of deprived the University of the greatest possible market value of its property. This greatest market value is of utmost importance to the University for the purpose of borrowing money secured by mortgage upon the campus, as it has repeatedly done in the past. It is also necessary for other financial purposes, showing its net financial resources, which are always looked into by donors of substantial gifts to educational institutions. Other financial considerations might also be mentioned.

In the fourth sentence on Page 14 of the petition counsel again seeks to create the impression that there were findings of fact, and that the District Court Judge recognized the same. On the contrary, the Judge added to the statement referred to in the petition the following words, "Parenthetically it may be remarked that there are no findings of fact to review" (J.A. 41). Furthermore, the Judge, earlier in his opinion, said "No findings were made. No statement of reasons was issued." (J.A. 39).

ADDITIONAL STATEMENT OF CASE

The Respondent, The American University, was founded by the late Bishop John F. Hurst of the Methodist Episcopal Church, who first visualized a great Methodist institution in the Nation's Capital and in pursuance of that thought in 1889 raised the necessary funds by solicitation for contributions and purchased an option upon a farm which embraced the present campus involved in this litigation. In the ensuing years he raised, by soliciting contributions, $100,000.00 and paid for the land. Thereupon, having assembled a group of representative men and women from all over the United States, he obtained a Charter from Congress by Special Act, approved February 24, 1893 (27 Stat. L. 476) (R.A. 1). That Charter established the incorporators named therein as a univer-

sity with all university powers. The Act of Congress, after the enacting clause and after listing the incorporators, continued as follows:

> "* * *, their associates and successors, two-thirds of whom shall at all times be members of the Methodist Episcopal Church, are hereby constituted a body politic and corporate by the name of THE AMERICAN UNIVERSITY, with power to sue and be sued, and be impleaded, and have perpetual succession; to acquire, take by devise, bequest or otherwise, hold, purchase, encumber, and convey such real and personal estate as shall be required for the purpose of its incorporation; to make and use a common seal, and the same to alter at pleasure; to choose a board of trustees consisting of not more than fifty, of whom fifteen shall constitute a quorum to do business, and which board shall be authorized to fill any vacancies in their number, to appoint such officers and agents as the business of the corporation shall require, and to make by-laws for the accomplishment of its purposes, for the management of its property, and for the regulation of its affairs. Said corporation is hereby empowered to establish and maintain within the District of Columbia a university for the promotion of education. The said corporation shall have power to grant and confer diplomas and the usual college and university degrees, and honorary degrees, and also such other powers as may be necessary fully to carry out and execute the general purposes of the said corporation as herein appearing."

Pursuant to that Act of Congress, other money was raised by subscriptions given by various of the incorporators and others, and the first University building was erected on the campus, called the College of History, but later named Hurst Hall, in memory of Bishop Hurst, which name it now bears. That building was completed and dedicated in 1895 and stands on the north side of Nebraska Avenue. Other buildings followed through the years and now a large number of them stand on the campus and are devoted to the educational purposes of the University.

By subsequent Acts of Congress the requirement that two-thirds of the Board of Trustees be members of the Methodist Church has been changed and now three-fifths or 60% of the members must be Methodists.

The General Conference of the Methodist Church, in the year 1952, definitely decided to assume full responsibility for the university and authorized substantial annual contributions of money to it upon conditions which have since been enacted by Congress in the Act approved August 1, 1953 (67 Stat. L. 359) (R.A. 2) under which trustees must be approved by the Board of Education of the Methodist Church and all the property of the University is held in perpetuity for educational purposes under the auspices of the Methodist Church.

Five Presidents of the United States have manifested their interest in the University, usually by laying a cornerstone or dedicating a building or participating in some other public ceremony (Plaintiffs' Exhibit No. 35, Tr. 500). Several Presidents have been members of its Board of Trustees.

The University had prior right to develop its campus with University buildings and other appropriate improvements, and the petitioners when they purchased their homes from the developers of Spring Valley and Wesley Heights, had notice by the presence of the University's campus and buildings of its existence, and development as a university. They could see its faculty and student body coming and going about University affairs. They were charged with knowledge of the University's Charter in said Act of Congress of February 24, 1893, and the broad scope of powers granted therein.

Fifteen years after completion of the first building, Hurst Hall, the white marble building which faces on Nebraska Avenue, the original zoning law was enacted by Congress, in 1920, and about five years later the developers of Spring Valley platted that subdivision and began the erection there of residences, some of which were sub-

sequently purchased by the petitioners herein. Before such development occurred, several other University buildings had been erected and occupied for University purposes.

During the first World War the University campus was occupied by the Chemical Warfare Service of the Army, which erected a number of buildings upon the campus and at the time of the termination of hostilities the Army had erected the framework of the present women's residence hall. This was later completed by the University and has been in constant use as such residence hall since its completion in 1925. Plaintiffs' Exhibit No. 39 (Tr. 500) shows this building as the Army left it at the close of hostilities and shows the completed McKinley Building beyond it to the left.

The proposed school of medicine is shown in the lower left hand corner on the general plan for development of the University in a photograph of a page of the University Courier, dated June 1895. (Plaintiffs' Exhibit No. 34, Tr. 500).

Several exhibits consist of photographic reproductions from the early University magazine called the Courier, showing the campus in its original state, a raw farm with a forest beyond it (Plaintiffs' Exhibits Nos. 42 and 36, Tr. 500); the laying of the cornerstone by President Theodore Roosevelt of the McKinley Ohio College of Government, now called the McKinley Building (Plaintiffs' Exhibit No. 35, Tr. 500), and various other of the buildings as they were completed and dedicated. These exhibits are referred to in the Joint Appendix, Page 571.

When the Zoning Commission first zoned the District of Columbia it gave the entire campus of the University the zoning classification of "A Residential". That was the original farm bought and paid for by Bishop Hurst. Later, with the consent of the University, two narrow strips of land on either side of Massachusetts Avenue were rezoned "A Residential Restricted". No other action of

the Zoning Commission affected the University campus until the Order of January 28, 1953, was made by the Zoning Commission.

By virtue of the Act of Congress chartering it, the University was authorized to establish on the Campus Tract an institution of learning as broad in its planning, scope, and activities as any university anywhere, the Congressional language is as follows:

> "Said corporation is hereby empowered to establish and maintain within the District of Columbia a university for the promotion of education. *The said corporation shall have power to grant and confer diplomas and the usual college and university degrees, and honorary degrees, and also such other powers as may be necessary fully to carry out and execute the general purposes of the said corporation as herein appearing.*" (Italics supplied.) (R.A. 2)

A university is "an institution organized for teaching and study in the higher branches of learning and empowered to confer degrees in special departments as theology, law, *medicine,* and the arts." *Webster's New International Dictionary Unabridged (1944).* (Italics supplied.)

The proposed new Sibley should be considered not only as a hospital for use of the general public, but as *a part of an educational institution,* i.e., "*for the promotion of education.*"

By its original Act of Incorporation, dated August 8, 1894, Sibley is empowered to conduct "a hospital for the care of the sick and distressed *and the training of nurses.*" (Plaintiffs' Exhibit 58, Tr. 540). By amendment recorded January 4, 1908, the objects of said corporation were restated to include "benevolent, charitable, *educational,* religious and missionary purposes" (Pl. Ex. 58). The Sibley school of nursing originating as an outgrowth of the Training School for Deaconesses and Missionaries established in 1887 by a society of the Methodist Church, and Sibley has

operated its school of nursing since its said incorporation. (Pl. Ex. 58.)

Just as it was fully known to the District of Columbia Zoning and Planning authorities that a school of medicine, nursing school, or hospital might at any time be lawfully established on the Campus Tract in furtherance of University purposes, so also must these possibilities and likelihoods have been known as a matter of public record to purchasers of neighboring realty and commercial real estate developers, who purchased their land and erected houses across the street from and adjacent to the Campus Tract.

The University is controlled by The Methodist Church. Sibley is also controlled by The Methodist Church. Both institutions are under the immediate and direct supervision of the Methodist Bishop of the Washington Area of said Church, the Rev. G. Bromley Oxnam, one of the foremost clergymen and educators of our nation. When a new Sibley was to be erected in accordance with the Federal Hospital Program, what was more natural than that Sibley should be moved to the Campus Tract? (See testimony of Bishop Oxnam, ZC Tr. 318, J.A. 143-150.) The University offered to, and later donated and conveyed 7.8 acres of land to Sibley. The saving to Sibley is apparent. The University now has its established nursing courses. (Pl. Ex. 44, J.A. 562). A hospital serves as a workshop for students in nursing. The placing on the Campus Tract of a new Sibley is directly in line with the modern trend and present standards of nursing education.

Other Universities in the District of Columbia have recently established hospitals on or near their Campuses. Georgetown Medical School, along with its new Hospital, has been located on the campus of Georgetown University. The new Providence Hospital, including its nursing school, is now being constructed and placed adjacent to the Campus of Catholic University, where its School of Nursing has for many years existed.

When Sibley and the University sought to join forces in this worthwhile endeavor for the benefit of both institutions and the advantage of the public, a protest against the project was raised by the neighboring property owners who, according to counsel, consider a hospital and school of nursing to be an "obnoxious" use in relation to their properties. (Tr. 369-370.) As a result of their protest, the Zoning Commission, *by a one-man majority decision,* "approved" their petition and "spot zoned" and upgraded but one piece of real estate, namely the Campus Tract, thereby retreating from the established zoning classification of Residential "A" which said Tract had had for more than thirty-two years.

While Sibley's Charter has been amended from time to time, its chief purpose since the time of its creation has been to conduct a hospital for the care of the sick and distressed and a school for the training of nurses. Both the school of nurses and the hospital are interdependent and are located at 1140 North Capitol Street in the District of Columbia.

The District Court painstakingly considered voluminous evidence, and lengthy testimony, and made complete findings of the factual issues in the case (J.A. 35-46) which were amply supported by the evidence before the Court. Among others, the Court *found as facts*: that the owners of the residences in Spring Valley-Wesley Heights had purchased their properties with notice that the University would expand and additional schools and departments would be created; that Sibley which is one of the large hospitals in the District of Columbia is housed in structures approximately 50 years old located in a congested, deteriorated section; that Sibley badly needs new buildings as well as removal to a more desirable neighborhood from the standpoint of its patients and the interests of the young women studying to be nurses; that its enrollment of student nurses in the nursing school has been falling off due to the undesirable location of the school; that the University

wishes to establish a school of nursing on a collegiate level; that the objections advanced before the Zoning Commission by the area residents, against the construction of the new hospital on close scrutiny were discovered by the Court to be unsound and ill-founded; that the testimony before the Zoning Commission of individual home owners consisted largely of emotional outbursts; that no findings were made by the Zoning Commission; that no statement of reasons was issued by the Zoning Commission; that schools of nursing and medical schools are natural constituent departments of any university; that the modern educational trend is for schools of nursing and medical schools to be operated in conjunction with hospitals; that often schools of nursing and medical schools with cooperating hospitals are located on university campuses as is the case, for example, with Georgetown University; that the construction and operation of a school of nursing or a medical school, together with the cooperating hospital, is a proper and natural use of a university campus; that to move Sibley to the proposed location would advance the welfare of its patients; that based on ample evidence (J.A. 335-361; Pl. Ex. 29, J.A. 560) there would be no insoluble traffic problems; that the evidence taken as to real estate values based on actual facts showed by uncontradicted testimony that the erection of Georgetown Hospital and Suburban Hosptial had not decreased the values of their nearby residential properties; that no other factual evidence was introduced respecting the effect on property values of the construction of any other hospital than those named, either in the District of Columbia or elsewhere.

By an Act of Congress approved August 7, 1946, entitled "An Act to Provide for the Establishment of a Modern, Adequate and Efficient Hospital Center in the District of Columbia", Congress first undertook to provide $35,000,000.00 for more adequate hospital facilities in the District of Columbia, and authorized the Federal Works Adminis-

tration to acquire land and construct buildings toward that end. (R.A. 3-6)

Ultimately hearings before the Sub-Committee of the Committee on Appropriations, House of Representatives, 82nd Congress, Second Session, on the Supplemental Appropriations Bill for 1953, H. R. 8370, (R.A. 6-11) were held on July 15, 1952, wherein grants were requested for five private non-profit hospitals (aside from the so-called hospital center). The tentative amount of the grant to Sibley was $4,691,000.00, based upon a total estimated cost of $9,382,000.00.

The provision for Congressional relief for Sibley is as follows:

> 3. Sibley Hospital.—Construction of the hospital building would provide a completely new plant containing 348 beds for surgical, medical, pediatric, and maternity patients, 46 bassinets, out-patient diagnostic clinic, X-ray department and laboratory, complete operating and delivery suites, and a nurses' home for 168 nurses, with all teaching facilities.
>
> TENTATIVE BREAKDOWN OF COSTS
>
Site	$1,406,000
Construction	6,620,000
Equipment	950,000
Fees, miscellaneous expenses	406,000
Total	$9,382,000 (R.A. 9)

Plaintiffs' Exhibit No. 64 (Tr. 748) entitled "Nursing in The Nation's Capital", prepared by the Public Health Service of the Federal Security Agency, showed that there was a shortage of professional nurses in the District of Columbia of 657 nurses as of the end of 1952 (latest figures then available). The testimony in the District Court further showed that Sibley was one of the few remaining hospitals in the District of Columbia which had been able to "weather the storm" and continue the operation of its school of nursing. Despite the present

serious shortage of nurses in the District of Columbia nurses' training schools in the District of Columbia are steadily declining in number. Only six nurses' training schools remain in the District of Columbia, namely, Gallinger, Freedman's, Garfield, Georgetown, Providence and Sibley. (J.A. 417-418) Nurses' training schools which have been abandoned in recent years include those formerly conducted by George Washington University, Emergency Hospital and St. Elizabeths Hospital. (J.A. 417-418) Less recently Homeopathic Hospital, Children's Hospital and Casualty Hospital have discontinued their schools of nursing.

The University and Sibley in March 1952, in reliance upon the zoning then existing, entered into negotiations for the transfer by the University to Sibley of a portion of the campus tract consisting of approximately 7.8 acres to be used for the erection of a new school of nursing and a hospital in conjunction therewith. They caused an examination to be made of the zoning statutes, maps and applicable regulations in the District of Columbia and conferred with zoning officials of the District of Columbia for the purpose of making certain that the proposed new buildings for the school of nursing and hospital could lawfully be constructed on the Campus Tract. (J.A. 295). They were advised by said zoning officials that the existing zoning permitted the desired construction. An architect was selected and employed by Sibley to design plans and make surveys and furnish other engineering and architectural services. He made such surveys and prepared the desired plans. Said services have now resulted in a cost to Sibley of approximately $25,000.00 (J.A. 192). Sibley agreed with the University to construct upon the Campus Tract a modern hospital of approximately 350 beds and a dormitory and school for nurses at an aggregate estimated cost in excess of $8,000,000.00 (J.A. 312).

The proposed new Sibley will be modern in every respect and not objectionable. (J.A. 214, 215, 194-196, 423, 430,

163-169, 171-173, 189, 191, Tr. 495). There is no smoke. There are modern methods of garbage disposal, incineration and sanitation. There are quiet zones. It is absolutely true factually that Sibley does not now have any ambulance service; never has had any; and does not propose to have any such service at the new location. (J.A. 420) The New Sibley will be entirely in harmony with other buildings and property in the neighborhood. (Plaintiffs' Exhibits Nos. 12, 13 and 14, Tr. 199). There will be ample parking spaces for persons using the hospital and nursing school (Plaintiffs' Exhibit No. 11, Tr. 199). There are approximately 200 parking spaces provided, with a possibility of increasing the parking spaces to 350 spaces, which is considerably more than the minimum requirements of one parking space for every four beds as required by Zoning Regulation Sec. XIV (a) (4) (a minimum number of 88 spaces) (J.A. 171, 299; R.A. 12).

The Zoning Advisory Council, *without taking any testimony and without even holding a meeting as a Council* (J.A. 454-456), filed a report with the Zoning Commission recommending that the zoning classification of the Campus Tract be upgraded and rezoned.

Thereafter, the Zoning Commission held a hearing of two and one-half days and on January 28, 1953, by the split vote of three to two, approved said Petition and ordered that the Campus Tract be rezoned from Residential "A" area to Residential "A Restricted". Whereupon respondents filed suit for an injunction and declaratory judgment in the District Court.

The hearing in the District Court was most thorough, extensive and exhaustive. Twenty-nine witnesses testified, including many experts, in a trial lasting over a three weeks' period. Besides the testimony in Court, the Judge, by stipulation, read and considered the testimony of 35 witnesses (some of whom later testified in Court) and examined many exhibits before the Zoning Commission. The trial Judge also examined a vast number of documents,

maps and other similar evidence. On June 29, 1953, the District Court filed its opinion. (J.A. 34-46) On June 30, 1953, judgment was entered setting aside the Order of the Zoning Commission as null and void and ordering restoration of the Campus Tract to the zoning classification of Residential "A" Area (J.A. 46-48).

The construction of a new Sibley Hospital and nursing school is in accord with the modern trend in nursing education, as well as general medical and health education of established schools of nursing and hospitals on or adjacent to the campuses of universities, where student nurses may receive their theoretical and their practical training in the "workshop" of a hospital. The new hospital and nursing school would help reduce the great shortage of nurses presently existing in the nation's capital, as well as improve the hospital facilities therein.

Dr. Francis J. Brown, a nationally known expert in nursing education (ZC Tr. 417), testified at length before the Zoning Commission (his uncontroverted testimony being received in Court by stipulation) that the proposed construction of a hospital and school of nursing on the Campus Tract is in keeping with the rapidly expanding policy to increase nursing education in collegiate institutions. (J.A. 208-211). As an illustration, he pointed out that within the past year a nursing school was built at the University of North Carolina directly across the street from a hospital and that both were located on the campus (ZC Tr. 420). He also testified that the State of Florida, after a comprehensive study by a full-time staff over a period of approximately the past year, had recently decided to establish a medical school, school of nursing, and hospital, within a single unit. He also testified that most Veterans' Hospitals built in the last few years have been constructed adjacent to a teaching center for doctors and nurses in accordance with a recommendation of Veterans' Administration Advisory Committees. He went on to state that one of the recommendations of the National

Committee for the Improvement of Nursing Services is that universities provide instruction and hospital facilities in a unified program to meet the national need for more and better trained nurses. Each of the recent several national studies have recommended the integration of collegiate nursing education with practical training in hospitals (J.A. 209). Within the 43 years since the first collegiate school of nursing was established, a total of 494 schools of nursing now utilize the teaching facilities of colleges and universities, 96 of which offer degree courses (J.A. 209). For the most part these collegiate schools have been established within the last 20 years (J.A. 209). Twenty-seven accredited nursing schools are connected with hospitals on university campuses, including such well-known universities as University of California, Yale, University of Michigan, University of Minnesota, Ohio State University, University of Oregon, Vanderbilt University, University of Texas, Stanford University, Georgetown University, University of Maryland, University of North Carolina, Duke University and the University of Pennsylvania. (Plaintiffs' Exhibit No. 2, J.A. 557)

The advantages of having a nursing school, hospital and university in very close proximity are obvious, viz., (a) close integration is provided between the instructional and experience aspects of the training of nurses; (b) the program of general education is combined with specialized training; (c) travel time between the nursing school, hospital and university is eliminated; (d) candidates for the nursing school are more easily recruited in attractive college surroundings, thereby reducing the shortage of nurses. (J.A. 208 et seq.; 213 et seq.; 193 et seq.; 404 et seq.)

The testimony of Sister Olivia Gowan (Director and Dean of Nursing Education at Catholic University, and President of the District of Columbia League of Nursing) was also uncontroverted. This witness pointed out that the modern hospital has three main functions, viz., (1) the

care and treatment of patients; (2) education and training of personnel involved in the treatment and care of patients; and (3) research. A hospital is concerned with the training of nurses, physicians, laboratory technicians, record librarians and general personnel in the field of health. This training can best be accomplished in conjunction with health education through a university. (J.A. 214)

She testified: "In a democratic country the students of nursing certainly should be given the opportunity of education that is afforded to young people in other fields of education . . ." (J.A. 216) In 1950 the National League of Nursing Education adopted the principle that all nursing education—practical, professional and graduate nurses —be conducted under the auspices of an educational institution. (J.A. 216) The National League of Nursing Education, which is the standard-setting body on a national basis, recognizing that hospitals are primarily training institutions, expressed a policy that nursing education should be conducted in universities in order to improve both the quality of nursing service and to protect the public. (J.A. 216) Whatever happens in relation to the educational program of Sibley directly affects the public. (J.A. 216) Sibley needs a new hospital and a new school for the education of nurses; both vitally need the University.

Sister Gowan further testified:

> "I would like to say here, that should not the citizens of this community consider this fact: Sibley Hospital, because of its Christian purpose, has appealed to parents of girls who are anxious to have them educated in a religious environment. This has been possible at Sibley, according to the wishes of the parents. The school actually had its beginning in the training of deaconesses of the Methodist Church. Today, more than ever, we need a Christian heritage. * * * In conclusion, may I say that I have tried to say that a modern hospital is not objectionable in any community. One of any university center is so impor-

tant to the welfare of our people that it deserves all the support that all of us have in our souls to support.

"In our troublesome times, we need, more than ever, the religious values that have been given to those who have brought Sibley Hospital and its school into its present state.

* * * * *

"Can we afford to discourage this fine contribution that has been within our midst, by saying, 'We don't want you within a certain section of our city'?" (J.A. 217 et seq.)

The importance of establishing a nursing school, hospital, and university together as an integrated unit was further emphasized by other well qualified witnesses (J.A. 201, 292, 193, 420, 404, 405, 408).

The Zoning Order which opposed and precluded the natural expansion and integration of Sibley and the University for the benefit of the community *was against the general welfare.* It was so properly decreed by the District Court.

Equitable, on March 27, 1952, loaned to the University $650,000.00 secured by a deed of trust on the University campus property. This loan was increased to $750,000.00 on August 27, 1952. At the time the hearing before the Zoning Commission on the petition for rezoning of the University campus property was held the unpaid balance of the loan was $740,627.71 (J.A. 238-239). The property securing this loan was the Campus Tract which was zoned Residential "A" at the time of the loan and had been so zoned for more than thirty-two years prior thereto, and under such zoning had an appraised value of $2,454,956.00, which includes a valuation for "special purpose" buildings. Disregarding the value of the "special purpose" buildings on the property, as lending institutions must do in valuing property for a loan of this type, the value of the land for loan purposes was $2,141,456.00 (J.A. 233-234, 239, 240, 245). This valuation of $2,141,456.00 was, after great deliberation by Equitable,

considered adequate for the loan of $750,000.00 made August 27, 1952 (J.A. 241).

The evidence before the Zoning Commission and the District Court showed that the value of the land after a change in zoning from Residential "A" to Residential "A Restricted" would drop from $2,141,456.00 to $849,-956.00 (J.A. 236). The evidence further showed that such a valuation would not offer the margin of safety required by lending institutions and necessitiated by prudent management for a loan of $750,000.00 (J.A. 234).

REASONS FOR DENYING WRIT

I.

The Case Is a Matter of Local Law

The actions of the United States Court of Appeals for the District of Columbia Circuit, the United States District Court for the District of Columbia and the Zoning Commission of the District of Columbia had reference and were related solely to a matter of local law.

The Zoning law of the District of Columbia has no application without the geographical boundaries of the District of Columbia. Said Act and the authority of the Zoning Commission of the District of Columbia relate to matters of local law affecting only the District of Columbia. In the matter of interpretation and application of local laws, in which no state or other jurisdiction could have any possible interest, the jurisdiction of the Supreme Court of the United States may not be invoked to serve and utilize the purpose of a second Court of Appeals or a second Court of last resort. Insofar as the Zoning Law, which is applicable only to the District of Columbia, is concerned, the decision of the United States Court of Appeals for the District of Columbia Circuit, in reviewing the case, rendering its Per Curiam opinion and judgment, and considering and denying a petition for a rehearing, should be considered as final and of no interest to this Honorable Court, because of the purely local character of the subject matter.

II.

Petitioners' Reasons for Granting Writ Are Invalid

Petitioners assert (P. 15) that, while this Court has upheld the constitutionality of zoning it has never decided a case involving the powers and limitations applicable in rezoning; and they urge that this Court should receive and consider the present case for the purpose of filling this alleged void. (P. 15) They cite *Euclid* v. *Ambler*, 272 U. S. 365, 71 L. Ed. 303, 47 Sup. Ct. 114, as this Court's case on original zoning, and then go on to cite numerous decisions of Federal and State Courts which, they say, demonstrate widespread conflict of opinions and rules as to principles applicable in rezoning cases. They say (P. 16) that, no petition yet filed in this Court for review of zoning decisions, has sought a ruling upon the constitutional limitations applicable to rezoning. The present case, they say, is the first in which this Court has been asked for such ruling.

Petitioners proceed to cite numerous decisions of the high courts in various states, and they divide these into two groups. The first group, they say, (P. 16) stands for broad construction of the scope of authority of a zoning commission in rezoning; the second group (P. 18), they say, stands in sharp conflict with the former and narrowly limits the authority of commissions to rezone. Petitioners say that the first group holds that the same considerations as to promotion of public health, welfare, and safety, obtain in both zoning and rezoning, that no vested rights are acquired under original zoning, and that constitutional limitations do not prohibit rezoning to meet changed conditions or to correct mistakes or to reflect changes in zoning policy. The second group, they say, (P. 17) place great importance on vested rights acquired in original zoning and permit rezoning only in instances of radical change of neighborhood conditions but not to correct mistakes in zoning or to effect changes in zoning policy.

From this, petitioners argue (P. 19) that the courts in the present case rejected the decisions broadly upholding

rezoning and rejected the authority of the zoning commission to rezone to promote public health, safety, and general welfare for reasons of neighborhood change, mistake of original zoning, or change of zoning policy, and so are in conflict with the decisions in the first group of cases cited by them.

This alleged condition of conflict, they say (P. 19), calls for this Court to review this case.

The weakness of petitioners' proposition lies in the inherent artificiality of its structure. While it is true that courts deciding zoning cases have from time to time enunciated propositions as to what should or should not be done in such cases and efforts have been made to discern and clarify certain fixed principles in such decisions that might make possible the ready classification of new cases, a realistic examination of zoning conflicts and zoning decisions quickly demonstrates that such an effort is doomed to practical failure. There are no genes predetermining by categories the result in each case. Examination of the decisions shows that each case is determined in the light of the surrounding circumstances which are peculiar to its own situation. The *ex post facto* efforts of text writers and others to categorize the decisions are, as consideration of the cases will show, of little help.

A.

Cases cited by Petitioners as upholding broad rezoning authority in a zoning commission

In *Verner* v. *Redman*, — Ariz. —, 271 P. 2d 468, (P. 16) owner applied for building permit for filling station for property zoned "commercial" while petition was circulating to change it to "Residential A"; he obtained permit and began construction. The permit was revoked. Owner applied to the Court, and it ordered the permit restored. Thereafter the city council rezoned the property to "Residential A". The rezoning was sustained, the court holding the owner did not acquire a vested right in commercial zoning.

In *Kenny* v. *Kelly*, — Texas —, 254 S.W. 2d 535, (P. 17) owner continued commercial use of lots after they were zoned residential (non-conforming use) for thirteen years, when he found they had been zoned residential. The lots were so shaped they could not be used for residential, and on owner's petition the zoning commission rezoned them "commercial". Nearby residents sued, but the Court upheld the commission classification, holding that *determination of the validity of the ordinance in dispute depended upon the circumstances of each case and the character of the regulations involved.* It held the action of the city council was not arbitrary or unreasonable.

In *Shemwell* v. *Speck*, — Ky. —, 265 S.W. 2d 469, (P. 17) a new highway was built diagonally through several lots, all zoned residential. One lot owner obtained rezoning for a fraternity house; adjoining owners brought suit. The Court held the *purpose of rezoning is not to protect property value of individuals but to promote community welfare* and that conditions justified the relaxing of restrictions even though there was no change in the area as a whole.

On the other hand, in *Marblehead Land Co.* v. *City of Los Angeles*, 47 F. 2d 528; certiorari denied 284 U. S. 634, 52 Supreme Court 18, 76 L. Ed. 540, (P. 16) appellants sought to enjoin enforcement of zoning ordinance prohibiting drilling operations which were begun while the land in question was excluded from a residential zone and on which about $200,000.00 had been spent. The Court found that drilling and operating and maintaining oil wells could contaminate the surrounding property with fumes and odors and cause serious discomfort and damage to surrounding owners and greatly depreciate their property values; and it held that the police power permitted the city to restrict the structures and business which would be maintained within various areas or zones so as to regulate and control future growth and development of the city. It held that the ordinance was not arbitrary or unreasonable or unequal. It held that a change of policy or of legislation

did not justify the Court declaring void an ordinance exercising legitimate police power.

In *Mallory* v. *Town of West Hartford,* 138 Conn. 497, 86 A. 2d 668, (P. 16) the city council approved an extension of a business zone, and plaintiffs, Home Owners Association, brought suit claiming the action was arbitrary, unreasonable, and without authority. The Court pointed out that the case did not concern changing a residential lot to business use, but enlargement of a long established business zone to give better facilities to a growing residential development as part of a comprehensive plan for the whole town. It noted that residents of the district opposed the change, but said that their protests were not controlling, that the commission had to consider the problem as it affected the town as a whole. It found no abuse of discretion.

There are many cases in which the more liberal zoning has been allowed. One such is *Northwest Merchants Terminal, Inc.* v. *O'Rourke, et al.,* 191 Md. 171, 69 A. 2d 743 (1948). In that case the Baltimore Planning Commission recommended amendment of the zoning ordinance to change from second commercial use to residential use certain properties in the vicinity of defendant's property and including a part of it. Defendant took steps toward erection of three storage warehouses on part of his land which, though in close proximity, lay along a railroad line. The builders' plat was approved and building permits issued. Neighboring property owners in the original residential district, none of whom being within the railroad segment covered by the amendment, protested to the buildings engineer, but he refused to revoke the permits; and defendants proceeded with three excavations and with pouring concrete. Plaintiffs, property owners, sued for an injunction and to void defendant's building permits. The lower court enjoined defendant. Expert witnesses testified without contradiction that the property was especially suited to the proposed industrial purpose and not advan-

tageously suited for residential purposes. One testified the proposed warehouses would have very little effect on neighboring property values. It was urged that erection of the warehouses would create hazard to the health, safety and security of surrounding property owners and would materially depreciate the value of their properties. They contended that trucking would destroy the quiet of the neighborhood and break up the paving. The Court pointed out that most residential neighborhoods are subject to some traffic of heavy trucks and also to local deliveries of oil, etc. The terminal company contended that the zoning ordinance was invalid because it was unreasonable, arbitrary and deprived defendant of property without due process of law. The court, denying the relief sought, said:

> "If a residential neighborhood desires protection by a border of unused property, necessarily it must provide its own property, not appropriate its neighbors' for this purpose.
>
> * * * * * * * *
>
> Property owners in a Residential district cannot create a "no man's land" at the border of their own district by forbidding one property owner in an adjoining district from making any use at all of his property, or any use for which it is 'peculiarly suitable'—especially when the adjoining district has been zoned for suitable uses for fifteen years."

In the case of *Kracke* v. *Weinberg, et al.*, 197 Md. 339, 79 A. 2d 387, the appellees were owners of approximately three acres of land, unimproved except for billboards and temporary structures in the vicinity of St. Mary's Industrial School, which had never been used for anything but storage purposes and for signs and billboards. It was bounded on one side by a paper street, which lay between it and the Pennsylvania Railroad. A zoning ordinance was adopted reclassifying it and other adjacent property as residential. Appellees sued to declare the ordinance invalid

as to their property, contending it had no value for residential purposes, that there had been no change in conditions to warrant the restrictive rezoning, and asserting that the latter was occasioned by public clamor and was unreasonable and arbitrary and amounted to taking property without due process of law. The trial court held the ordinance invalid as to this property; the city did not appeal, but the intervenors did. Appellate court noted that the rezoning created a residential barrier between the railroad and certain other properties, the owners of which demanded that they be protected by preventing commercial and industrial development on the land between them and the railroad. The Court noted that the property had never been used for residential purposes and could not be without prohibitive expense and that *the only real apparent reason for reclassifying it as residential was to protect the property of those who lived to the south and east of it, who sought to create a barrier between them and the railroad and other existing commercial property.* The Court likened this case to the *Northwest Merchants Terminal* case, *supra,* and quoted with approval the part of that opinion quoted above.

Johnson, et al, v. *Evangelical Church,* 77 Ga. App. 671, 54 S.E. 722, was a case of property owners seeking to override zoning to permit specifically building of a church on the ground it would depress the value of neighboring residential property. The court rejected the contention that the action of the zoning commissioners was in violation of the zoning ordinance, holding that the court should not disturb the rezoning unless the proceedings were contrary to law or there had been no exercise of discretion or a manifest abuse of discretion; it found none of these and did find some evidence of desirability of the location and that most of the residents in the vicinity were not opposed.

In *Tulsa Oil Company* v. *Morey,* 137 N.J.L. 388, 60 A. 2d 302, the oil company applied for permits for a gasoline station which was denied by town commissioners because of

objection by neighboring property owners. The area was designated A Residential, but the courts had already examined the validity of residential restrictions on property immediately east of this and held the refusal of the commissioners was not reasonably related to public health, safety, etc., and so was arbitrary and capricious. It noted another case where the restriction was not suitable to the immediate locality. It held the zoning ordinance was not a bar to a permit for the gasoline station. The court found that the general nature of the area remained the same as when previously considered and found, as well, that the instant property was best suited for business purposes and that the restriction to residential use could not be upheld. The court observed:

> "It remains to determine whether the Board acted arbitrarily and without relation to the standard there established. Belleville Avenue is a main thoroughfare and is heavily traversed by motor vehicles. The area west of the premises is more appropriately suited to business than residential use. It was testified congestion on the streets would not be increased nor would fire hazards be created with the establishment of the gasoline station. Considering the general character of the neighborhood and all the pertinent testimony, the refusal of the Board to grant the requested permit was arbitrary and unreasonable."

In *Lamarre, et al.* v. *Commissioner of Public Works of Fall River*, 324 Mass. 542, 87 N.E. 2d 211, neighboring residence owners sued to compel commissioner to enforce zoning ordinance as it stood prior to amendment by city council redistricting an area to permit housing authority to build four-family residences. The auditor found there would be "some but not great depreciation" in market value of petitioners property, but he found a shortage of rental housing and that the housing authority had fifteen applications on hand for rental houses such as those projected. Petitioners contended the amendment was an unauthorized exercise of legislative power by the city council.

The Court ruled that a zoning ordinance will be sustained unless there is no substantial relation between it and the furtherance of any of the general objects mentioned in the statute; and it said it will be set aside only where the court is convinced that the ordinance involves a merely arbitrary exercise of power having no substantial relation to these objects. But the court found that the contemplated project would tend to relieve the housing shortage in the City and that the amendment would tend to correct undue concentration of population and so promote the public welfare, and dismissed the petition, saying: "In our opinion it was not an instance of 'spot' zoning. It did not appear that there was 'a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot.' "

B.

Cases cited by Petitioners as narrowly limiting rezoning power to cases of radical neighborhood change

In *Monmouth Lumber Co.* v. *Ocean Township, et al.*, 9 N. J. Rep. 64, 87 Atl. 2d 9 (1952), plaintiff sued to set aside change of classification of its land and denial of variance which would have permitted it to build a garage in connection with its concrete mixing plant.

The Court observed that, where the Board of Adjustment *authorizes* a variance, there must be proof of undue hardship, but where it may *recommend* it may do so in particular cases "for special reasons" which may include, but do not necessarily require, proof of unnecessary hardship. In the latter cases, it has discretionary power to approve or disapprove. In the present case, the Board of Adjustment determined plaintiff had presented "special reasons" warranting the variance, indicating denial would result in undue hardship to it, and that allowance of variance would benefit the general welfare of the township. The township committee, however, found the vari-

ance would result in further depreciation of area property values, that expanding the industrial use area would be against the interest of the township, and that the evidence did not support plaintiff's claim of undue hardship (having to continue storing vehicles in the open) as a special reason for the variance. The Court noted the proposed new building would constitute an enlargement of non-conforming use of plaintiff's property; that the question whether open storage was less objectionable than the proposed building was a matter for judgment of the Municipal authorities. The Court ruled that a non-conforming use may not be enlarged or modified simply because the new use would be no more harmful than the old and said:

> "Further, it is settled that the welfare of a community will not be sacrificed for the purpose of permitting the most profitable use of premises."

It held change of conditions (abandonment of industrial uses and growth of residential use) motivated the rezoning and that plaintiff failed to show abuse of discretion in disapproval of the recommended variance. This case bears no relationship to the case at bar.

In *Clifton Hills Realty Co.* v. *City of Cincinnati*, 60 Ohio App. 443, 21 N. E. 2d 993, plaintiff and defendant acquired, in 1927, lands both zoned Residential B. Plaintiff subdivided its land and built single-family residences. Defendant's land remained undeveloped until 1932, when City Council adopted regulation allowing four-family multiple dwellings in Residence B District, with garages for not more than four vehicles. Thereafter, numerous persons, relying on plaintiff's restrictions and on the City's districting of properties of plaintiff and defendant, Clifton Development Company, purchased lots from plaintiff and built residences thereon. Then, in 1936, Federal Housing Administration, Ring Construction Co., and New York Life Insurance Company undertook to purchase

land of defendant and built 92 unit-type apartment houses, each for eight or more families, and a two-story public garage for 280 automobiles, with service facilities. The City Council, in 1936, amended the official zone plat to place the land in Residence C District. Plaintiff alleged that, while the ordinance recited it was for the best interests of the public, the Council acted arbitrarily and solely to meet demands of those who contended it was necessary to create work for the unemployed; and plaintiff contended that the ordinance was unreasonable and not a proper exercise of police power, and bore no relation to public health, safety, etc. The Court said:

> " 'If a general zoning ordinance is passed and persons buy property in a certain district, they have a right to rely upon the rule of law that the classification made in the general ordinance will not be changed unless the change is required for the public good. *Western Theological Seminary* v. *City of Evanston,* 325 Ill. 511, 156 N.E. 778; *Phipps* v. *City of Chicago,* 339 Ill. 315, 171 N.E. 289. Where the amendment of a zoning ordinance is clearly an arbitrary and unreasonable action on the part of the city council and not authorized or contemplated by the zoning statute, it is of no force and effect. *Michigan-Lake Building Corp.* v. *Hamilton,* 340 Ill. 284, 172 N.E. 710; *Brown* v. *Board of Appeals,* 327 Ill. 644, 159 N.E. 225, 56 A.L.R. 242.' "
>
> • • •
>
> "What we hold is that the amended petition shows a threatened violation of the plaintiff's property rights on the part of The Clifton Development Company and the individual defendants resulting from the disregard of the provisions of the lawful ordinance in reliance upon the later ordinance, which is of no force and effect, if the allegations of the amended petition are true."

The position of the parties was the reverse of those at bar where the University's occupancy long preceded that of the homeowners and even the enactment of the zoning law.

In *Wakefield, et al.*, v. *Kraft, et al.*, 202 Md. 136, 96 A. 2d 27, appellants bought a lot in the immediate vicinity of a combination filling station, tavern, and lunch room, on one corner of an intersection, a dance hall, skating rink and restaurant about 700 feet south from the intersection, and a filling station to the north of the intersection; and sought rezoning to permit a filling station. Commissioners reclassified accordingly to Commercial 'A' and neighbors protested and sued for injunction and for amendment of zoning map, contending action of commissioners was unconstitutional, invalid, void, constituted spot zoning, and was arbitrary and merely for accommodation of the property owner. The Court said the rezoning enjoyed a presumption in favor of its validity and that one attacking it must show affirmatively that it was arbitrary, capricious, discriminatory, or illegal; the presumption of reasonableness and constitutionality, it said, applies to rezoning as well as to original zoning, though with more force to original zoning as this is presumed to have been well planned and designed to be permanent. The court said:

> "It is basic to the law of property that a man shall be allowed the widest use of his property, consonant with the protection of neighbors. In order to justify, therefore, a restriction of that use, it must be shown that such restriction is in some manner related to the police power of the sovereign."

The Court observed there were abundant facts before the commissioners to meet a challenge to the propriety and fairness of their action. It reversed the decree below which granted an injunction.

C.

Different facts yield different results

Petitioners conclude (P. 19) that the courts below rejected the *authority* of the zoning commission to rezone land, even when it found that this would promote public health, etc., where there had been a change of neighborhood conditions, a mistake in original zoning, or a change in zoning policy. And petitioners assert (P. 19) that this highlights a conflict as to the constitutional limitations applicable to rezoning among various federal and state courts, including the courts below, and presents a substantial and important question of law which has not been determined by this Court. The truth of the matter is that the courts below did not reject the *authority* of the zoning commission to rezone; they recognized the priority of rights of the University through its early acquisition and continuous ownership of the property in question and, further, determined that the proposed establishment of a hospital would not adversely affect the public health, safety, and general welfare of the inhabitants of the area, but, moreover, would *promote* these vital public interests of the general community. (J.A. 41-46, P.A. 26).

While this result may differ from the results in some other zoning cases, federal and state, as urged by Petitioners (P. 19), this case does not present "A direct conflict as to the constitutional limitations applicable to rezoning" and "A basis upon which this Court may grant certiorari," as they further urge (P. 19). The differences in these zoning cases grow out of differences in factual situations.

D.

The case at bar creates no conflict

Petitioners go on in Section II of their argument (P. 19-21) to construct a hypothesis on which to base a claim of conflict of decisions and, in that, a compelling reason for

this Court to review the action of the courts below. The hypothesis is without foundation of fact.

They endeavor to pose a conflict of decisions between *City of Euclid* v. *Ambler, supra,* and *Geneva Investment Co.* v. *City of St. Louis,* 87 F. 2d 83, Cert. Den. 301 U.S. 692. Petitioners say (P. 19) that the courts below in this case concluded that the decision in *City of Euclid* v. *Ambler, supra,* does not apply in a case of rezoning. This, they say, is demonstrated by the courts below holding that the action of the zoning commission in restricting the University campus to "Residential A Restricted" which "removed apartment zoning from an area restricted essentially to single-family homes" bore no substantial relationship to the promotion of public health, etc., moreover, they say, this is in direct conflict with *Geneva Investment Co.* v. *City of St. Louis, supra.*

In the first place, the courts below did not conclude that the principle of the *Euclid* case does not apply in rezoning cases; no such thing can be found in either of the Opinions below. Secondly, petitioners are not being factual when they say (P. 19) that the courts below held the action of the Zoning Commission in rezoning the campus property "which removed apartment zoning from an area restricted essentially to single-family homes, bore no substantial relationship to the promotion of public health," etc. The courts below, in spite of the seemingly limitless references of petitioners to "apartment zoning" were dealing with the matter, specifically, of proposed erection of a *hospital,* and that in connection with and as a part of an established university. Petitioners are urging that differing results are sufficient reason for this Court to call up such cases as these for review, while the truth is, as examination of the individual cases shows, the seeming difference of result is the outgrowth of different factual situations.

Petitioners go on (P. 20) to urge, as nearly as can be ascertained from their confused statements, that the deci-

sions below may not be distinguished from the *Euclid* case simply because we are here dealing with a hospital rather than an apartment. To permit such a distinction, they say, would be contrary to the decision of this Court in *Church of Jesus Christ of Latter Day Saints* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823, certiorari denied, 338 U.S. 805. The California Court there upheld the exclusion of a church from a restricted residential district. Petitioners are ignoring the admonition of this Court that its denial of a writ of certiorari is not to be taken as a determination in any way of the merits of the case.

Again, (P. 20) petitioners cite a decision of this Court, *American Communication Association* v. *Douds*, 339 U.S. 382, as authority that a municipality under a zoning ordinance may exclude churches from a restricted residential district when the location of the church would affect adversely many nearby property owners. They go on to express disbelief that a hospital enjoys a position superior to that of a church. Of course, there is no question of relative superiority of position involved, as petitioners well know. Moreover, this Court mentioned the church case in the *Communication Association* case only in passing; its decision was that the *Communication Association* case be dismissed for want of a substantial federal question.

Petitioners would make much (P. 20-21) of the fact that a hospital operates 24 hours a day and 365 days of the year and so would generate considerably more noise and traffic than a church. Petitioners' fancied conflict of sound and safety is even more artificial than their self-constructed conflict of legal theories and court decisions as between zoning and rezoning.

FURTHER REASONS FOR DENYING WRIT

I

The Zoning Commissioners of the District of Columbia, through the Corporation Counsel, actively participated in the District Court Trial and prosecuted their own separate appeal in the United States Court of Appeals for the District of Columbia Circuit. (Appeal #11,942).

The Zoning Commission represents and is charged with preservation and protection of the public interest as distinguished from the private, individual interests of owners including intervenors-appellants.

Following the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the decision of the District Court as being "clearly right", the members of the Zoning Commission "on Tuesday, July 27, 1954, met as the Zoning Commission of the District of Columbia and decided not to apply to the Supreme Court of the United States for a Writ of Certiorari in said case" and moved said Appellate Court "for an Order allowing them to withdraw their motion for a stay of mandate in said case". (R.A. 13). On August 23, 1954, the Court of Appeals entered an Order "that insofar as the appellants in Case 11,942 (members of the Zoning Commission) have moved to stay issuance of the mandate herein, said motion be, and it is hereby, considered as withdrawn". (R.A. 14). On October 5, 1954, the District Court entered an Order on the Mandate decreeing that the judgment entered in this cause on the 30th day of June, 1953, be in all respects affirmed. (R.A. 15). Thus, at the present time, the Order of the District Court dated June 30, 1953, which voids the Order of the Zoning Commission dated January 28, 1953, has been affirmed and said Rezoning Order has been set aside, leaving the Campus Tract now in a zoning classification of Residential "A"—as it existed at all times prior to the up-grade Order of the Zoning Commission of January 28, 1953. It is the intervening neighboring property owners (not the Zoning

Commission) who alone, as petitioners, are now seeking to alter and change the zoning classification presently existing by filing this petition with this Court despite the actions taken by the District Court and the Court of Appeals and despite the acquiescence of the Zoning Commission, representing the interests of the entire public of the District of Columbia, in the decision of the Court of Appeals.

The litigation is now finally disposed of insofar as the three original plaintiffs and the five original defendants comprising the Zoning Commission are concerned. The litigious applicants for the writ were permitted to intervene by the District Court, not as a matter of right, but merely as a matter of grace, and it is their continued action, for reasons best known to themselves, that has prevented the plans of the University and the hospital from going forward.

II

There is no conflict between the decision of the United States Court of Appeals for the District of Columbia Circuit in this case and the decision of the United States Court of Appeals for the Eighth Circuit in the *Geneva Investment Company* v. *City of St. Louis,* 87 F. 2d 83 (1938), Cert. Den. 301 U.S. 692, since both Courts held that rezoning action must meet the test of bearing a substantial relation to the public health, safety, morals or general welfare.

The legal principles involving the validity and application of local zoning ordinances have already been enunciated by this Court. *Euclid* v. *Ambler,* 275 U.S. 375, 71 L. Ed. 303; *Nectow* v. *Cambridge,* 277 U.S. 183. This case falls well within the orbit of those decisions. There are no novel questions of law, but rather the factual application of principles already determined.

The District Court and the Court of Appeals applied the standards established by this Court in the foregoing

decisions for testing the constitutionality of a local zoning ordinance to the circumstances of the case at bar.

In the *Nectow* case this Court stated:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, *such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare.*" (Italics supplied)

In the *Euclid* case this Court stated:

> "* * * when, if ever, the provisions set forth in the ordinance in tedious and minute detail come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."

The United States Court of Appeals for the District of Columbia has applied these principles in the District of Columbia. *Bugher* v. *Gottwals,* 60 App. D.C. 340, 54 F. 2d 451 (1931); *Dorsey* v. *Gottwals,* 61 App. D.C. 41, 57 F. 2d 407; *Garrity* v. *District of Columbia,* 66 App. D.C. 256, 86 F. 2d 207; *Wolpe* v. *Poretsky,* 81 App. D.C. 67, 154 F. 2d 330 (1946), Cert. Den. 329 U.S. 724, 67 S. Ct. 69, 91 L. Ed. 627; *Hazen* v. *Hawley,* 66 App. D.C. 266, 86 F. 2d 207.

In the case of *Wolpe* v. *Poretsky* (*supra*) an order rezoning appellees property, upgrading it to prevent construction of an apartment house, was set aside by the District Court and such action was affirmed by the United States Court of Appeals, which stated:

> "Even apart from the housing shortage, it (the rezoning order) would have borne no positive relation to the public welfare and would have been arbitrary and unreasonable. In view of the acute housing shortage it bore a negative relation to the public welfare."

This Court denied the petition for certiorari in that case. (Cert. Den. 329 U.S. 724, 67 S. Ct. 69, 91 L. Ed. 627).

The Courts have generally applied the same constitutional limitations in the exercise of police power to rezoning cases as to original zoning cases. *Western Theological Seminary* v. *The City of Evanston,* 325 Ill 511, 525, 156 N.E. 778, 783, 784; *Strain* v. *Mims,* 123 Conn. 275, 193 A. 754; *Northwest Merchants Terminal* v. *O'Rourke,* 191 Md. 171, 60 A. 2d 743; *Vine* v. *Zabriski,* 122 N.J. L. 46, 3 A. 2d 886; *Benner* v. *Tribbitt,* 190 Md. 6, 57 A. 2d, 346, 353; *Kracke* v. *Weinberg,* 197 Md. 339, 79 A. 2d, 387.

In the leading case on the subject of *rezoning* of *Western Theological Seminary* v. *The City of Evanston,* 325 Ill. 511, 525, 156 N.E. 778, 783, 784, nearby property owners succeeded in obtaining a rezoning of a specific parcel of property after The Theological Seminary had leased the land but before it could erect its buildings. The Court declared:

> "After the City Council had had the entire subject under long and thorough consideration it adopted the zoning ordinance which regulated in great detail the uses to which the various parcels of real estate in the city might be put * * *. This ordinance was then considered sufficient to protect the public welfare of the community, and this was the condition under which the appellant acquired its right in property within the A residence District. Neither the City Council nor the legislature is authorized, under the powers of the Constitution, to take away or limit the appellant's right to make any use of the property which was lawful at the time it acquired it, except in such ways as may be necessary for the public health, comfort, safety or welfare."

> "The legislative determination as to what is a proper exercise of the police power is not conclusive. Whether the means employed have any real, substantial relation to the public health, comfort, safety, or welfare, or are arbitrary and unreasonable, is a question which is subject to review by the courts, and in

determining that question the courts will disregard mere forms and interfere for the protection of rights injuriously affected by arbitrary and unreasonable action." (Case cited) (p. 783 et seq.)

Petitioners admit that many courts have entertained these views when they state on page 17 of their brief, after citing a long list of cases, that "In a number of the decisions cited above the courts held that the same relationship to the promotion of public health, welfare, and safety exists between original zoning as in rezoning." Regardless of whether the action of a Zoning Commission constitutes original zoning or rezoning, it must still meet the constitutional test of a proper exercise of the police power and such action must bear a substantial relation to the public health, safety, morals or general welfare.

The District Court heard or considered the testimony of 50 witnesses and examined 103 exhibits on the facts bearing on the constitutional issues and concluded that the order of the Zoning Commission upgrading a portion of the campus of the University so as to preclude the erection thereon of a school of nursing and hospital did not bear a substantial relation to public health, safety, morals and general welfare.

Where there is a conflict of evidence before the Trial Court on the question of whether an order of the Zoning Commission bears any reasonable relation to the protection of the public health, safety, morals and general welfare, appellate courts will not disturb the findings of fact of the Trial Court unless they are clearly wrong. *Hazen* v. *Hawley, supra; Strain* v. *Mims, supra.*

The Federal Rules of Civil Procedure provide that: "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Rule 52a, F.R.C.P.). (R.A. 13).

The Court of Appeals, after reviewing the facts and law in this case held that the District Court was "clearly

right'' in finding that the upgrade zoning order represented a taking of the University's property without due process of law as not bearing a substantial relation to public health, safety, morals or general welfare under the *Nectow* case, *supra.*

III

The constitutionality of a statute is not involved. We are here considering the validity of a zoning ordinance under the police power and a taking of property in violation of the Fifth Amendment. The constitutional facts were found against the petitioners after a prolonged and thorough hearing in the trial court. The Appellate Court has reviewed these facts and has found against the petitioners. Such facts should not again be reviewed by this Court which is not a second Court of Appeals.

In the District Court 29 witnesses testified, 14 witnesses for petitioners and 15 witnesses for respondents. 103 exhibits, including models, maps and photographs were examined by the Trial Judge, who also took a ''view'' of the property involved. The Trial Judge also by stipulation of the parties read and considered the testimony of 35 witnesses for both sides given before the Zoning Commission (some of whom also testified to other matters at the trial). The facts on the constitutional issues were found against and are binding and conclusive against petitioners.

IV

Throughout their petition, petitioners urge upon this Court the unique proposition that the scope of review by the Courts of an order of a zoning commission should be to determine whether the zoning commission ''made its finding based upon substantial evidence in the records'' (page 6). This is a gross misconception. Petitioner admits that action of the Zoning Commission is a ''legislative function delegated by Congress to the Zoning Com-

mission for the District of Columbia." (P. 22.) This should not be confused with the functioning of the Board of Zoning Adjustment which acts in a quasi-judicial capacity. If petitioners' view prevailed, legislation passed by Congress could be questioned in the Courts on the basis that it is not supported by evidence obtained in committee hearings—obviously an untenable position.

Furthermore, the Zoning Commission made no "finding" despite the statement of petitioners to the contrary which is contained on page 5 of their brief and elsewhere. The District Court stated in its findings of fact and opinion "Parenthetically it may be remarked that there are no findings of fact to review." (J.A. 41).

It is well established that the governmental power to interfere by zoning regulations with the general rights of the land owner, or restricting the character of his use, is not unlimited and the determination of this question is a duty which the Court must discharge. *Bugher* v. *Gottwals,* 60 App. D.C. 340, 54 F. 2d 451 (1931).

This rule of law, heretofore consistently applied in this jurisdiction, was laid down by the United States Court of Appeals for the District of Columbia Circuit many years ago when it said:

> "In the case we refer to (Bugher), we did not hold, nor do we hold here, that the action of the Zoning Commission interfered with the general rights of the landowner without regard to public safety, morals or general welfare. All that we said in the Bugher case, and all that we say now, is that this is a question of fact, which ought to receive judicial scrutiny and decision when, as is the case here, it is raised by proper averments in the bill." *Dorsey* v. *Gottwals,* 61 App. D.C. 41, 57 F. 2d 407 (1932).

Also see *Garrity* v. *District of Columbia,* 66 App. D.C. 256, 86 F. 2d 207; *Hazen* v. *Hawley, supra,* and *Wolpe* v. *Poretsky, supra.*

The District Court here followed the usual procedure of judicial review. An extensive and exhaustive hearing

was held in the District Court; many witnesses testified; much documentary evidence was produced as hereinbefore described.

The method of judicial review applied in this case was that agreed to and stipulated by all parties. The record of the hearing before the Zoning Commission was received in evidence as though the witnesses who testified before that Commission had been called in court and there also testified. Both sides reserved the right to cross-examine any witness who had testified before the Zoning Commission. It was stipulated that the testimony given by any witness before the Zoning Commission should have the same force and effect as though given under oath at the trial, although counsel on both sides were not precluded from asking additional questions of any such witnesses. This was done in the interest of shortening the trial so that any examination already had before the Zoning Commission would not be repeated. (J.A. 9 266-A-D, Tr. 530-532; J.A. 412).

Prior to the trial one of the attorneys for the Zoning Commission stated:

> MR. GASCH: "At that time (trial of the Hyman case) I reviewed the authorities and came to the conclusion that where B.Z.A.—Board of Zoning Adjustment—was involved, that that was on the record. That is the usual view of that matter. *But where the Zoning Commission is involved, since they act legislatively, and since in some cases there is no record of why the legislative agency, the Commission, made such a decision, that those cases are usually decided de novo.* (Italics supplied.)
>
> THE COURT: "You mean testimony taken by the Court.
>
> MR. GASCH: "Yes, Your Honor, that has been the practice in this Court in most of the Zoning Commission cases." (J.A. 266-A)

Thereafter the trial on the merits proceeded without objection and by consent of all parties.

Petitioners are not now in a position to object to the scope of judicial review applied by the Court, which was proper in any event under the principles of law hereinbefore discussed.

V

Petitioners contend that "the District Court refused to require respondents to exhaust their administrative remedy." (Petitioners' Brief 21)

Sibley and the University could obviously not proceed before the Board of Zoning Adjustment—a body subordinate to the Zoning Commission—for the reason that the Order of the Zoning Commission rezoned the entire campus property (not alone that parcel given by the University to Sibley) from Residential "A", which permits a hospital as a matter of right, to Residential "A" Restricted, which classification specifically excludes a hospital. (See Use and Occupancy Table (P.A. 34), "A", Hospital, "yes"; "A" R., Hospital, "no"; and (P.A. 36), Section III 7, providing that hospitals, sanitariums, and clinics for human beings are permitted in the "A", "B", "C" and "D" area districts only. (Petitioners' Brief 22 III). Petitioners admit that hospitals are prohibited in Restricted residential districts in the District of Columbia). Since the Board of Zoning Adjustment does "not have the power to amend any regulation or map" (P.A. 31), the Board of Zoning Adjustment would have been without authority under the statute to permit the establishment of a hospital and therefore could not grant the relief suggested. Furthermore, constitutional rights are protected by the Courts—not by administrative bodies (such as the Board of Zoning Adjustment) as suggested by petitioners.

CONCLUSION

Now, to draw together and unite the ligaments of the case. The function of the zoning authority is to be carried out within the framework of furtherance of public health, safety, morals, and general welfare but without being arbitrary, unreasonable, or depriving of property without due process of law. It is the peculiar characteristic of zoning cases that their determination rests primarily upon the ascertainment and weighing of the facts in each case. The application of principles of law derived from past cases is actually a matter of elucidating the facts in the case at hand within the structure of which they are parts. The facts in this case show a University developing along generally accepted lines and coming logically to include in its plan a hospital in connection with its teaching program (which already includes various courses for nurses in training), with the prospect, perhaps, at some future date, of a school of medicine (foreshadowed in its earliest plant). There appears, then, a residential development, beginning some thirty years after the physical establishment of the University, which seeks now to throttle that University's proper and logical development as a great educational institution, this assertedly in the name of public health, safety, morals and general welfare. Yet these are the very objectives to be served and furthered by the public service institution which the University seeks to establish upon its campus, the land which it acquired and began developing toward its present outstanding growth at a time long prior to the existence or even prospective envisioning of the complaining residential area.

In the light of these facts, there should be no doubt on the part of this Honorable Court that the opinion and judgment of the District Court, sustained by appellate Court, is well grounded in both fact and law, and should not now be disturbed. That result is to be reached whether this Court regards the case in the light of the University's priority of ownership and development dating from long

prior to the development of surrounding residential real estate or on the basis of what is fair and reasonable zoning practice, as distinguished from an attempt at destructive discrimination against the University in the name of zoning.

For the foregoing reasons, the petition herein (of the intervenors-appellants below) should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX

52nd Congress

Chapter 160—2nd Session

AN ACT TO INCORPORATE THE AMERICAN UNIVERSITY:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John H. Vincent, John E. Andrus, James M. Buckley, Mark Hoyt, Jesse L. Hurlbut, James M. King, Charles C. McCabe, Charles H. Payne, John E. Searles, Junior; John S. Huyler, of New York; Charles W. Buoy, J. A. M. Chapman, G. P. Hukill, Robert E. Pattison, Charles Scott, Mrs. Matthew Simpson, of Pennsylvania; Julian S. Carr, of North Carolina; David H. Carroll, Jacob Tome, Alpheus W. Wilson, of Maryland; Charles H. Fowler, of Minnesota; William M. Springer, J. B. Hobbs, of Illinois; John P. Newman, of Nebraska; Job H. Jackson, of Delaware; Redfield Proctor, of Vermont, W. W. Smith, of Virginia; D. B. Wesson, M. Burnham, of Massachusetts; Thomas Bowman, of Missouri; and John F. Hurst, Louis E. McComas, Benjamin Charlton, Andrew B. Duvall, Matthew G. Emery, Charles C. Glover, S. S. Henkle, Benjamin F. Leighton, John E. Beall, Aldis B. Browne, Mrs. John A. Logan, H. B. Moulton, Hiram Price, Mrs. Elizabeth J. Somers, Brainard H. Warner, and S. W. Woodward, of the District of Columbia, their associates and successors, two-thirds of whom shall at all times be members of the Methodist Episcopal Church, are hereby constituted a body politic and corporate by the name of THE AMERICAN UNIVERSITY, with power to sue and be sued, and be impleaded, and have perpetual succession; to acquire, take by devise, bequest or otherwise, hold, purchase, encumber, and convey such real and personal estate as shall be required for the purpose of its incorporation; to make and use a common seal, and the same to alter at pleasure; to choose a board of trustees consisting of not more than fifty, of whom fifteen shall

constitute a quorum to do business, and which board shall be authorized to fill any vacancies in their number, to appoint such officers and agents as the business of the corporation shall require, and to make by-laws for the accomplishment of its purposes, for the management of its property, and for the regulation of its affairs. Said corporation is hereby empowered to establish and maintain within the District of Columbia a university for the promotion of education. The said corporation shall have power to grant and confer diplomas and the usual college and university degrees, and honorary degrees, and also such other powers as may be necessary fully to carry out and execute the general purposes of the said corporation as herein appearing.

Sec. 2. That this act may be amended or repealed at any time by the Congress in its pleasure.

Approved, February 24, 1893.

Public Law 183—83d Congress
Chapter 309—1st Session
S. 1273

AN ACT

All 67 Stat. 359.

To amend the Act entitled "An Act to incorporate the American University", approved February 24, 1893, so as to clarify the relations between the Board of Trustees of the American University and the Board of Education of the Methodist Church, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to incorporate the American University", approved February 24, 1893, as amended, is amended by redesignating section 2 thereof to be section

3, and by inserting after the first section thereof a new section as follows:

"Sec. 2. (a) After the date of enactment of this section—

"(1) no person shall be elected to the board of trustees of the corporation unless the election of such person has been approved by the Board of Education of the Methodist Church; members of the board of trustees shall hold office until their successors are elected;

"(2) all property, both real and personal, of the corporation shall be held in perpetuity for educational purposes under the auspices of the Methodist Church and subject to the terms and provisions of the Discipline of the Methodist Church; and

"(3) the board of trustees of the corporation shall not propose any amendment by the Congress to this Act unless the proposal of such amendment has been previously approved by the Board of Education of the Methodist Church.

"(b) In the case of any violation by the corporation or the board of trustees of any of the provisions of subsection (a) of this section, all right, title, and interest of the corporation in and to all property, both real and personal, of the corporation shall vest in the Board of Education of the Methodist Church, a corporation organized under the laws of the State of Tennessee, or its successor."

Approved August 1, 1953.

Public Law 648—79th Congress
Chapter 803—2d Session
S. 223

AN ACT

To provide for the establishment of a modern, adequate, and efficient hospital center in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That in order to provide more adequate hospital facilities in the District of Columbia the Federal Works Administrator is authorized to acquire land and construct buildings and to these ends is empowered:

(a) to acquire prior to the approval of title by the Attorney General (without regard to sections 1136, as amended, and 3709 of the Revised Statutes) improved or unimproved lands or interests in lands in the District of Columbia by purchase, donation, exchange, or condemnation (including proceedings under the Acts of August 1, 1888 (25 Stat. 357), March 1, 1929 (45 Stat. 1415), and February 26, 1931 (46 Stat. 1421)) for such hospital facilities;

(b) by contract or otherwise (without regard to sections 1136, as amended, and 3709 of the Revised Statutes, and section 322 of the Act of June 30, 1932 (47 Stat. 412), prior to approval of title by the Attorney General, to make surveys and investigations, to plan, design, and construct hospital facilities in the District of Columbia on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available (the transfers of which for this purpose by the Federal agency having jurisdiction thereof are hereby authorized notwithstanding any other provision of law), provide proper approaches thereto, utilities, and procure necessary materials, supplies, articles, equipment, and machinery, and do all things in connection therewith to carry out the provisions of this Act; and

Sec. 2. Notwithstanding any other provision of law, whether relating to the acquisition, handling, or disposal of real or other property by the United States or to other matters, the Federal Works Administrator, with respect to any hospital facilities acquired or constructed under the provisions of this Act, is authorized to enter into leases with private agencies for the operation and maintenance of such hospital facilities or useable separable portions thereof upon such terms, including the period of any such leases,

annual rentals, provision for joint use of facilities, provisions for operation, maintenance, repair, and replacement of buildings, equipment, machinery, and furnishings and appropriate security to assure the performance of any such leases, and to sell for cash or credit or to convey in exchange, for other properties any such hospital facilities or usable separable portion thereof to private agencies on such terms as may be deemed by the Administrator to be in the public interest: *Provided,* That all hospitals participating in such center shall be required either to convey to the Government, free and clear of all incumbrance, the land and buildings now held by them or to sell the same at such price as is agreed to and approved by the Federal Works Administrator and to pay the proceeds thereof to the Government at the option of the Federal Works Agency.

Sec. 3. In carrying out the purposes of this Act, the Federal Works Administrator shall provide a hospital center of such size and design as he shall deem feasible and economical of operation.

Sec. 4. In carrying out the provisions of this Act the Federal Works Administrator is authorized to utilize the services of or to act through the United States Public Health Service in the Federal Security Agency, the Federal Works Agency, and any other department or agency of the United States, and any funds appropriated pursuant to this Act shall be available for transfer to such department or agency in reimbursement thereof.

Sec. 5. Thirty per centum of the net amount expended by the Federal Works Administrator under this Act shall be charged against the District of Columbia and shall be repaid to the Government by the Commissioners of the District of Columbia at such times and in such amounts, without interest, as the Congress shall hereafter determine. The District of Columbia shall be entitled to 30 per centum of the sale price of any of the properties sold by the Federal Works Administrator under section 2 of this Act, other than

properties the value of which is deducted from the gross amount expended to determine the net amount upon which the 30 per centum to be charged against the District of Columbia is computed, and the District of Columbia shall also be entitled to receive 30 per centum of any rentals received from the leasing of any of the hospital facilities acquired or constructed by the Federal Works Administrator under this Act. The amounts which may be due the District hereunder shall be credited on the amount owed the Government by the District of Columbia until such obligation of the District is discharged in full.

Sec. 6. For carrying out the purposes of this Act, including administrative expenses, there is hereby authorized to be appropriated during the period ending June 30, 1952, the sum of $35,000,000 to be appropriated at such times and in such amounts as the Congress shall determine.

Approved August 7, 1946.

Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 82d Congress, 2d Session, on the Supplemental Appropriation Bill for 1953, H. R. 8370, Part I, at p. 185

GENERAL SERVICES ADMINISTRATION

Hospital Facilities in the District of Columbia

Witnesses: W. E. Reynolds, Commissioner of Public Buildings; H. G. Hunter, Deputy Commissioner of Public Buildings; W. Meade Keller, Regional Counsel, Region 3; D. E. A. Cameron, Director, Budget Division, General Services Administration; J. E. Strawser, Budget Representative, Public Buildings Service.

Mr. Thomas: Come in, gentlemen, and have a seat.

With us this afternoon we have our distinguished friends, Mr. W. E. Reynolds, Commissioner of Public Buildings; Mr. H. G. Hunter, Deputy Commissioner; Mr. W. Meade Keller, regional counsel, region 3; Mr. D. E. A. Cameron,

Director, Budget Division, General Services Administration; and M. J. E. Stawser, Budget Representative, PBS.

You are appearing in connection with an estimate for $11,400,000 as contained in House Document No. 467, to implement the act of October 25 of last year which implemented the old act of August 7, 1946, where you had an authorization of $35,000,000, if I remember—

Mr. Reynolds: Thirty-five million, to establish a hospital center.

Mr. Thomas: And heretofore we appropriated $2,200,000 cash and have given contract authorization of $19,500,000.

Then Congress authorized $14,400,000 to take care of all the agencies in the District of Columbia, private agencies, but within the total authorization of $35,000,000; is that correct?

Mr. Reynolds: That is correct.

Mr. Thomas: It is on a 50-50 basis?

Mr. Reynolds: That is right; and the District of Columbia is to repay the Federal Government at the rate of 3 percent per year for half of the contribution that the Federal Government makes.

* * * * * * * * * *

GRANTS TO PRIVATE HOSPITALS

Mr. Thomas: You are seeking $11,400,000.

At this point insert in the record page 3, which shows a breakdown showing the contributions and names of the five cooperating institutions.

Also put in the paragraph on the bottom of page 4 and at the top of page 5 in the record, showing the administrative cost of $84,500 during 1953.

But that is for the administrative cost on the $11,400,000 during 1953 and the total administrative cost on it will be $284,500.

Breaking down that cost a little bit further, Mr. Reporter, also insert at this point the last paragraph on the obligations by objects, 02, 04, 06, and 07, on the green sheet num-

bered 6, which shows justification of the estimate of $11,400,000, to take care of the five participating hospitals on a 50-50 matching basis; travel, $500, communication services, $500, printing and reproduction, $1,000; other contractual services, $500.

Then you have an element here of services performed by "Construction services, public buildings, General Services Administration," $81,000.

Supplies and materials, $1,000.

So you have $84,500; that adds up correctly.

(The material referred to is as follows:)

Following is a list of the private agencies requesting grants, a brief description of the proposed program of each, the estimated cost of the program, and the tentative amounts of the grants.

	Total estimate of cost	Tentative amount of grant
1. Children's Hospital of the District of Columbia[1]	$ 3,259,000	$ 595,000
2. Providence Hospital	8,000,000	4,000,000
3. The Lucy Webb Hayes National Training School for Deaconesses and Missionaries, including Sibley Memorial Hospital	9,382,000	4,691,000
4. Eastern Dispensary and Casualty Hospital	2,059,000	1,029,500
5. National Homeopathic Hospital	1,600,000	800,000
Total	$24,300,000	$11,115,500

[1] Children's Hospital was partially completed at the time of the passage of this act, which accounts for the small amount of grant requested.

* * * * * * * * * * *

2. Providence Hospital.—The construction of the hospital building would provide a completely new plant containing

352 beds for surgical, medical, pediatric, and maternity patients, 60 bassinets, quarters for 60 Sisters, out-patient diagnostic clinic, X-ray department and laboratory, complete operating and delivery suites, and a nurses' home for 150 student nurses, with all teaching facilities.

TENTATIVE BREAKDOWN OF COSTS

Site	$ 500,000
Construction	6,600,000
Equipment	500,000
Fees, miscellaneous expenses	400,000
Total	$8,000,000

3. Sibley Hospital.—Construction of the hospital building would provide a completely new plant containing 348 beds for surgical, medical, pediatric, and maternity patients, 46 bassinets, out-patient diagnostic clinic, X-ray department and laboratory, complete operating and delivery suites, and a nurses' home for 168 nurses, with all teaching facilities.

TENTATIVE BREAKDOWN OF COSTS

Site	$1,406,000
Construction	6,620,000
Equipment	950,000
Fees, miscellaneous expenses	406,000
Total	$9,382,000

* * * * * * * * * *

The work program of the various agencies contemplates the acquisition of land, where required, the preparation of plans and the award of contracts during the 1953 fiscal year. Based on this program and considering the total estimated cost to be incurred by the agencies involved, it would be necessary that the GSA incur obligations, in 1953, in the amount of $11,115,500, for payments to the various agencies as the program progresses.

The off-site administration of the grant program by GSA will involve the processing of applications for grants, periodic payments to the agencies as work on the projects progresses, advisory technical assistance for the development of plans and specifications, checking of plans and specifications from preliminary design through the working drawing stages to completion, checking of modifications in original plans during the construction period, and making periodical and final inspection of construction and attendance at conferences with officials of agencies involved. It is estimated that the sum of $284,500 will be required for these purposes and for general office expenses incidental thereto, during the presently contemplated life of the program. Of this amount, the sum of $84,500 will be required during fiscal 1953. It is not anticipated that the administration of the program will require additional personnel to be charged directly to this appropriation, but that technical and clerical services will be made available as needed for the program and covering reimbursement will be charged to the appropriation on a time-card basis. The estimate for 1953 provides $81,000 for such services together with an amount of $3,500 for nominal sums required for communication services, printing and reproduction, and other miscellaneous office expenses.

The additional amount of $11,400,000 is requested as a supplemental appropriation under this head to finance the grant portion of the District of Columbia hospital program.

* * * * * * * * * * *

Mr. Thomas: Is there any other city in the United States where the taxpayers and the Government pay 50 percent of hospital construction cost for hospitals, that you recall, outside of the District of Columbia?

Mr. Reynolds: I am not familiar with the programs outside the District of Columbia. I know the Hill-Burton bill operates. To what extent that participation goes, I cannot say.

Mr. Thomas: That is only in small poor communities where they do not have a hospital. The larger cities of the United States or the larger counties are not even eligible for it.

Mr. Yates: Are these funds given on the condition that proportionate amounts will be raised by the hospitals themselves?

Mr. Reynolds: Yes; they have to have the funds available before we enter into a contract with them. In other words, they cannot be conditional amounts.

Mr. Yates: Are the funds granted under the Hill-Burton Act or another law that is equivalent to the Hill-Burton Act, that applies specifically to the District of Columbia?

Mr. Reynolds: It applies, but I think under the formula they have a very small amount.

Most of that information was developed on the hearings on authorization; but we have no interest in that part.

Mr. Yates: What check do you have that the amounts requested are reasonable?

Mr. Reynolds: We expect to not only approve the drawings and specifications that were prepared in these hospitals but also to actually check on the contracts and the funds they actually pay out so that we will be sure we are within the limitations as authorized by the Congress, of 50 percent.

STATUS OF THE PRIVATE HOSPITAL PROJECTS

Mr. Yates: Have contracts been let for construction for the hospital?

Mr. Reynolds: The only one that has been let is the Children's Hospital; that is under contract.

Providence Hospital has acquired a site and has an architect working on the drawings and specifications.

Sibley Hospital has arranged for the site. They are more or less in the preliminary stage. They are not as far along as the first two.

Casualty Hospital has completed the drawings and specifications.

Public Law 547—82d Congress
Chapter 758—2d Session
H. R. 8370

AN ACT

All 66 Stat. 637.

Making supplemental appropriations for the fiscal year ending June 30, 1953, and for other purposes.

* * * * * * * * * * *

GENERAL SERVICES ADMINISTRATION

HOSPITAL FACILITIES IN THE DISTRICT OF COLUMBIA

For expenses necessary in carrying out the provisions of the Act approved August 7, 1946 (60 Stat. 896), as amended (65 Stat. 657), authorizing the establishment of a hospital center in the District of Columbia, including grants to private agencies for hospital facilities in said District, $11,400,000, to remain available until expended: *Provided,* That the foregoing appropriation shall be the total amount to be provided by the Federal Government for the completion of the projects contemplated in connection with such appropriation: *Provided further,* That appropriations and contract authorizations heretofore granted under the head of "Hospital Center, District of Columbia" shall be merged with and accounted for as a part of this appropriation.

* * * * * * * * * * *

Sec. 1416. This Act may be cited as the "Supplemental Appropriation Act, 1953."

Approved July 15, 1952.

Zoning Regulations of the District of Columbia

(1953 Ed.)

Section XIV(a)(4)

"4. Except as otherwise provided in this paragraph, the amount of off-street parking area required under para-

graph 1 of this section shall be determined in accordance with the following table:

* * * * * * * * * *

Hospitals: 1 parking space for each four beds."

(pp. 23-24.)

Section XV(b)

"In the "A" semi-restricted-area district the minimum dimensions of yards and courts and the maximum percentage of lot occupancy shall be the same as for "A" area district, except that hereafter no building shall be erected or altered for use as an * * * hospital * * * nor shall any building or premises be used for these purposes."

(pp. 26-27.)

Federal Rules of Civil Procedure

Rules 52(a)

"Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein * * *."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Caption of case)

Motion to Withdraw Motion for Stay of Mandate

The appellants in the above-entitled case having, on Tuesday, July 27, 1954, met as the Zoning Commission of the District of Columbia and decided not to apply to the

Supreme Court of the United States for a writ of certiorari in said case, hereby move the Court for an order allowing them to withdraw their motion for stay of mandate in said case.

Respectfully submitted,

/s/ VERNON E. WEST,
Corporation Counsel, D. C.,
(and others)
Attorneys for Appellants.

(Caption of cases)

Before: Stephens, Chief Judge in Chambers.

Order

It appearing that on July 23, 1954, appellants in the above-entitled cases filed a single joint motion to stay the mandate herein for a period of thirty (30) days pending application to the Supreme Court of the United States for a writ of certiorari, and it appearing that on July 27, 1954, appellants in Case No. 11,942 filed a motion to be allowed to withdraw their motion for stay of mandate, and it appearing that no objections to either of the aforesaid motions have been filed, it is

ORDERED that insofar as the appellants in Case No. 11,942 have moved to stay issuance of the mandate herein said motion be, and it is hereby, considered as withdrawn.

It is FURTHER ORDERED that insofar as the motion of appellants in Case No. 11,943 for a stay of the mandate is concerned said motion be granted and that issuance of the mandate be, and it is hereby, stayed to and including August 23, 1954.

Dated: August 6, 1954

(Caption of case)

Before: Edgerton, Wilbur K. Miller and Bazelon, Circuit Judges in Chambers.

Order

Upon consideration of appellants' motion to stay the mandate herein to September 17, 1954, and of the opposition thereto filed by appellee The American University, it is

ORDERED by the Court that the aforesaid appellants' motion be, and it is hereby, denied.

Per Curiam.

Dated: September 14, 1954

Circuit Judge Wilbur K. Miller did not participate in the foregoing Order.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Caption of case)

Order on the Mandate

Defendants having appealed to the United States Court of Appeals for the District of Columbia Circuit from the Judgment entered in this cause on the 30th day of June, 1953, and said Court having issued its Mandate dated the 27th day of September, 1954, wherein it was Ordered, Adjudged and Decreed that such Judgment be affirmed, with costs assessed at $637.92 in favor of the Appellee, The American University; $695.91 in favor of the Appellee, Lucy Webb Hayes National Training School for Deaconesses and Missionaries; and $88.50 in favor of the Appellee, Equitable Life Insurance Company;

Now, upon the Mandate of the United States Court of Appeals for the District of Columbia Circuit, dated the 27th day of September, 1954, it is this 5th day of October, 1954

ORDERED, ADJUDGED AND DECREED, That the Judgment entered in this cause on the 30th day of June 1953 be, and it

is hereby in all respects affirmed, and that Judgment be entered that The American University, Lucy Webb Hayes National Training School for Deaconesses and Missionaries, and Equitable Life Insurance Company recover of Brigadier General Louis A. Prentiss, Renah F. Camalier, Samuel Spencer, Conrad L. Wirth, and David Lynn, as Members of the Zoning Commission of the District of Columbia; and Alice D. Wrather; Percy H. Russell, Jr.; Clayton H. Hixson; Fred A. Smith, Harrison Somerville; H. Lamar Henderson; John L. Sullivan; Harold R. Stark; and Thomas W. McGregor, jointly and severally, the sums of $637.92, $695.91, and $88.50 respectively, as costs on Appeal and that they have execution therefor.

/s/ ALEXANDER HOLTZOFF, *Judge.*

(Caption of case)

Order Amending Order on the Mandate

Upon further consideration of the Mandate herein of the United States Court of Appeals for the District of Columbia Circuit, dated the 27th day of September, 1954, and the order thereon entered by this Court on the 5th day of October, 1954, it appearing that the said order is incorrect as to the award therein of judgment for costs on appeal,

NOW, THEREFORE, it is by the Court, this 12 day of October, 1954,

ORDERED, ADJUDGED AND DECREED that the order on the Mandate, heretofore made and entered herein on the 5th day of October, 1954, be, and it is hereby, amended by substituting for the last paragraph thereof the following:

ORDERED, ADJUDGED AND DECREED that the judgment entered in this cause on the 30th day of June, 1953, be, and it is hereby, in all respects affirmed, and that judgment be entered that The American University recover of Alice D. Wrather, Percy H. Russell, Jr., Clayton H. Hixson, Fred A. Smith, Harrison Somerville, H. Lamar Henderson, John L. Sullivan, Harold R. Stark, and Thomas W. McGregor,

jointly and severally, the sum of $637.92, as costs on appeal, and that it have execution therefor; and that judgment be entered that Lucy Webb Hayes National Training School for Deaconesses and Missionaries recover of Brigadier General Louis A. Prentiss, Renah F. Camalier, Samuel Spencer, Conrad L. Wirth, and David Lynn, as Members of the Zoning Commission of the District of Columbia, the sum of $695.91, as costs on appeal, and that it have execution therefor; and that judgment be entered that the Equitable Life Insurance Company recover of Brigadier General Louis A. Prentiss, Renah F. Camalier, Samuel Spencer, Conrad L. Wirth, and David Lynn, as Members of the Zoning Commission of the District of Columbia, the sum of $44.25, as costs on appeal, and that it recover of Alice D. Wrather, Percy H. Russell, Jr., Clayton H. Hixson, Fred A. Smith, Harrison Somerville, H. Lamar Henderson, John L. Sullivan, Harold R. Stark, and Thomas W. McGregor, jointly and severally, the sum of $44.25, as costs on appeal, and that it have execution therefor.

/s/ ALEXANDER HOLTZOFF, *Judge.*

SEEN:

/s/ MILTON D. KORMAN,
Asst. Corp. Counsel, D. C.
Of Counsel for Members of Zoning Commission

/s/ NORMAN M. GLASGOW
Of Counsel for Defendants Wrather, et al.